No. 91-7580

In The

Supreme Court of the United States

October Term, 1992

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME II, PAGES 314-612

MICHAEL E. TIGAR
University of Texas
School of Law
727 East 26th Street
Austin, Texas 78705
(512) 471-6319
Counsel for Petitioner

ROBERT S. WALT
Assistant Attorney General
of Texas
P. O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2080
Counsel for Respondent

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* * *

[p. 1124] October 19, 1981

MR. BOBBY J. PRYOR, called as a prosepective [sic] juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q Good morning, Mr. Pryor. We're sorry to have you inside on a pretty day like today. We will take as little time as possible. I know it has been an inconvenience, the time you spent up here already, but we will have it concluded this morning. It has been two or three days now since we have spoken as a group Friday morning with regard to certain principles that apply in the trial of a criminal case. I notice from looking at your information form you served as a civil juror before, but you never served as a criminal juror, is that right, sir?

A Yes, Sir.

Q There were a lot of things I went over Friday morning that I want to make sure you have no problem understanding them and applying them if I gave them to you as the law, if you serve as a juror in this case. We talked about the fact that the defendant is presumed innocent [p. 1125] until he is proven guilty. The State has the burden of proof in a criminal case, and must prove to you beyond a reasonable doubt that the defendant is guilty to each element that is alleged in the indictment. That the indictment that exists against Mr. Graham is not any evidence of guilt, the fact that he is present in our Courtroom does not indicate to you any evidence of guilt

on his behalf. He is presumed innocent until proven guilty. That if the case is presented and you serve as a juror that the Defense has the right, that is guaranteed by law to the defendant, that the defendant does not have to testify or present testimony in his behalf. If he does not testify or present any testimony, you can infer no guilt from that. We also talked about the order of trial in a capital murder case, and that the trial in a criminal case and unlike a civil trial, there are two different phases. The first is the guilt or innocence phase. It is then at that time you only decide if the defendant is guilty or not guilty of what he is accused of, and if you find him guilty and only if you find him guilty do you go to the punishment phase, [p. 1126] and it's at that time that you decide whether or not what punishment should be. Do you have any problems understanding those concepts, Mr. Pryor?

A No.

Q Okay, as I told you Friday, the defendant, Gary Graham, is charged with the offense of capital murder, and that means that if he is convicted and the jury must deliberate on punishment, his fate, the jury can only return one of two verdicts on punishment. They can either assess his punishment at life in prison, in the Texas Department of Corrections or they can assess his punishment by death by lethal injection. It is hard to talk about something like this early in the morning, but it is a fact that if he is convicted, he could possibly get the death penalty, and both sides, as I told you Friday, when I asked you to think about your feelings about the death penalty as punishment, are very interested and concerned as to your feelings, because we want twelve people who serve on this jury that are qualified jurors. We do not want

twelve people who say because you have taken somebody's life you [p. 1127] automatically should get the death penalty because there are many cases in this Courthouse in which a person's life has been taken, but the death penalty is not a possibility. The death penalty is a possibility in this case, as I told you, because Mr. Graham is accused of taking another person's life while he was in the course of committing a robbery, and by virtue of the fact that there is an allegation of two felonies joined together, this creates the possibility of the death penalty as the possible punishment. So the question that I have to ask you to begin with, Mr. Graham – excuse me, Mr. Pryor, I'm sorry, is whether or not you have any conscientious, religious or moral scruples against the imposition of the death penalty as punishment in a case you might deem to be proper? Do you think that you could serve as a juror in a case where the death penalty was returned as punishment?

A Yes, Sir.

Q Okay, so what you are telling me, then, is that you have no religious or conscientious or moral scruples against imposing the death penalty in a case you feel to be proper, is that right, Mr. [p. 1128] Pryor?

A Yes, Sir.

Q Okay, when a juror deliberates, Mr. Pryor, on whether or not the death penalty is the proper punishment in the case, they don't do it by the Judge sliding a blank piece of paper under the door and writing life or death on it. That is not the way it is done. The jury communicates its answers to the defendant as to what the punishment should be by the way they answer special

issues. If you had civil jury service before, you know what I mean because that is what is submitted to you in the Court's Charge on a civil case. Do you understand that, sir?

A Yes, Sir.

Q It's the way that the jury answers the special issues that determines whether or not the defendant gets life or death on the punishment phase of the trial. Once again, this is only if you find him guilty of capital murder. If you find him not guilty, you don't even consider any special issues. He walks out the door, just like you and everybody else does. But those special issues that I am talking about are pinned up on the bulletin board up here to your [p. 1129] right, and right now I only want you to be concerned about the first two. If you take a moment, Mr. Pryor, to read those first two special issues, and then we will talk about what they mean. I see you went to B. C. Ellmore High School. Did you go when Greg Pruitt was there?

A I was on the team when I was a sophomore and he was a senior.

Q He was mighty good even then. Let me ask you a few questions about – or let me strike that. Before I ask you any questions, let me do a little bit more explaining abut how the special issues work. Once again, Mr. Pryor, you only consider these special issues if you get to the punishment phase of the trial, and the State has the same burden improving to you that the death penalty is proper by the way you answer these special issues as they have the same burden on the guilt or innocence phase of the trial. The State must prove to you beyond a reasonable

doubt that the defendant is guilty, likewise, the State has the burden of proving to you that the answers to these special issues should be yes and that the death [p. 1130] penalty should result. There is no guessing game for the jury when they go back to deliberate upon punishment. The jury knows by the way that they answer these special issues what the punishment will be. If they answer at least the first two special issues yes, if the answer is yes to both of these special issues, the defendant will get the death penalty, and there is no way I can change the jury's verdict if the jury votes in the manner that the defendant will get the death penalty. I can't change that. I can't say that he ought to get life and change it. Likewise, if the jury votes to give the defendant life, I can't change it to give him death. I do what the jury tells me, okay, do you understand that?

A Yes.

Q If the jury is to answer either or both of these special issues yes, it must be a unanimous verdict. All twelve would have to agree that the answer should be yes, okay?

A Yes.

Q If it's to be a no answer, it's like it was when you were in that civil case, if it can be a [p. 1131] ten – two vote, if the jury feels there should be a no answer to either of these special issues, there must be a vote of at least ten saying it should be no, okay?

A Yes.

Q No on the first special issue we are asking you whether the conduct of the defendant that caused the

death of the deceased was committed deliberately and did he reasonably expect that the death of the deceased or another person would occur. Now, obviously, in looking at this issue, we are asking you to go back and think about the conduct of the defendant in which he took the persons' life that he killed. Okay, you can see that because I'm asking you about the conduct of the defendant that caused the death of the deceased, we are asking you to think back to the testimony that you have heard on the guilt phase of the trial. We are asking you two questions about that conduct. Number one, in killing the person that you have convicted him of killing, did he do that deliberately and number two, did he reasonably expect that he was going to kill that person. So you see in my mind, those are the two key [p. 1132] phrases to that issue, and one other thing I want to tell you about these issues, Mr. Pryor, is that I won't be giving you any definitions about these words, you will be using your common sense, what you believe these words to mean. When I think of a word, deliberately, and a person committing a deliberate act, I think that if the person intended to do what he did or his objective or conscious objective to do what he did, and he went ahead and did it, just like when the Bailiff called you to come in to the Courtroom and you walked in and you sat down in that chair, you intended to walk in and sit down in the chair. It was a deliberate act on your part. It's like you tripped on the table and just happened to fall in the chair. You intended to do that. The same thing kind of holds true in this first special issue. When you think about the defendant taking the life of the deceased, did he take that person's life deliberately. Did he do it on purpose? Not

did he do it in a premeditated fashion. Did he think about it for weeks before it took place, but did he intend to do what he did, and number two, did he reasonably expect that he was going [p. 1133] to kill the person that he killed. Was it an accident that resulted in that person's life being taken or did he reasonably expect that it was going to be done that way. Let me give you a couple of examples that I think may show you that there may be different ways that you answer this issue. Assume with me that somebody walks into a Utotem Store, and the person walks into the store intending to rob the clerk, but not to do any harm to the clerk. He just wants money. He doesn't want to hurt anybody. He walks into the store with a pistol and knowing that he needs the money did not, did not intend to hurt anybody, and he slips on a wet piece of floor right in front of the door and the gun flies out of his and he falls on the floor and the gun hits the floor and the gun goes off and the bullet hits the clerk and the clerk dies. In looking at that, you might say I think the fact that he went into the store, but he didn't intend to kill that person that he killed, he didn't reasonably expect to kill that person, he went in to rob and not to hurt anybody, you see, you might answer that situation no, that he didn't reasonably expect to kill [p. 1134] the person that he killed. Would you agree with that, Mr. Pryor?

A Yes.

Q On the other hand if he walks in with a pistol and guns the clerk down in cold-blood, you might say he did it deliberately and he reasonably expected to kill that clerk. Do you see the difference I'm driving at?

A Yes, Sir.

Q Do you have any problems understanding what we talked about so far?

A No.

Q So, assume with me, Mr. Pryor, that you have answered that question yes, you believe after going back and thinking about the testimony that was presented to you in which you were convinced that the defendant took the life of the deceased, he did it deliberately and he reasonably expected to kill that person, we then move to the second issue, and in the second issue we are asking you if there is a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society. Once again, I won't be giving you any definitions as to what these words mean, but [p. 1135] I am asking you more or less to review the facts that you had in this case and what other evidence is admitted to you in the evidence and for you to look into your crystal ball and into the degree this special issue requires predict the future in this person. We are asking you if it is more likely than not, if there is a probability, is it more likely than not that the defendant is going to commit criminal acts of violence in the future that will be a continuing threat to society. There is a broad class when we talk about criminal acts of violence. It could be anywhere from somebody walking up and punching you in the back in a way that you might find offensive. That is a Class C assault on one end all the way to the other end of capital murder. There is a lot of other crimes in between: rape, robbery, assault, even property crimes of violence. If somebody takes a screw driver and goes from one end

of your car to the other end and tears up the paint job, that is a crime of violence, also. So those are all different crimes of violence we are talking about, and whether or not the defendant will probably commit those acts of violence to the extent that [p. 1136] he will be a continuing threat to society. Do you understand what we are talking about?

A Yes, Sir.

Q Okay, once again, I won't give you definitions as to what those mean. There is other evidence that can be presented to you if it is proper. You know, you can consider the facts of the crime, you can consider any past criminal record the defendant has, you can consider any other crimes he may have committed, you can consider what other people in the community said about him, if they say he is a good person or a bad person, and all that, you can consider in saying how you want to answer number two. Once again, if you decide answer yes, all twelve of you must agree that it should be answered yes. If ten or more of you decide it should be answered no, then it is answered no. A no answer to any of those means life in the penitentiary. All yes answers mean death. Do you understand that, Mr. Pryor?

A Yes.

Q Any questions about what we have talked about so far?

A No.

[p. 1137] Q Okay, now, in the trial of a capital murder case, in the punishment phase, and that is what we are talking about right now, you will always get those

first two special issues. They would always be there on the punishment phase, the second half of the trial in a capital murder case. There is a possibility that there may be a third special issue in this case, and that is the special issue at the bottom and is attached to that board. If you will take a moment to look at that and I will spend some time talking to you about that because I think number three is a lot more confusing than the first two. In looking at that third special issue, Mr. Pryor, the first thing that it says that is important is if raised by the evidence. You will remember from your prior jury service that you are told by the Judge that the only evidence that you can consider is testimony that comes from the witness stand, like when those witnesses testified in that other trial you had or some type of written documents or photographs. And our law says if it is raised by the evidence, if there is just one line of testimony, it doesn't have to be [p. 1138] three witnesses saying the same thing. It doesn't have to be a half day's worth of testimony. Just one line of testimony, and if that one line raises the issue, raised by the evidence, then special issue number three calls upon you to compare the acts of the defendant and the acts of the person who was killed before he was killed, and we are asking you to compare their conduct in one particular way. We are asking you did the person that was killed, did the deceased do anything to help provoke the situation or add to or contribute to the fact that he was killed. That is difficult to understand because we are not saying that a person who has been convicted of capital murder, of walking into a store, possibly committing robbery and shooting the clerk has a right to self-defense. We are not saying that, because that person walked in the store and

robbed the clerk, started off the difficulty or brought about the problem. By provoking the difficulty he can't claim self-defense. He can't claim it was the other persons' fault. Do you understand that, sir?

A Yes.

[p. 1139] Q However, if the other person who was killed in some way contributed to or adds to the situation to an extent that we say he helped provoke it, then you can look at that person's conduct and you decide if the defendant was unreasonable in killing him. That is hard to understand because we can't think it's reasonable to take somebody's life, but in this special issue we are not asking you to say that the defendant did not do wrong. We are asking you if you think it's proper to say that the defendant should get death or life in the penitentiary instead of death. So that is why this special issue is presented to you. Let me give you a different situation to show how you might answer it yes one way and no the other way. Let's go back to our situation where the person just goes in to rob and not kill. He goes into the store, not intending to hurt anybody, takes the money from the clerk and has walked almost all the way out of the store, and the clerk pulls a gun out from under the counter and shoots him in the back and wounds him and he falls to the floor. That clerk is coming around the counter with the gun in his hand, and he knows [p. 1140] if he doesn't shoot the clerk, he is going to be shot dead on the floor. Out of trying to do something to keep himself from dying, he shoots at the clerk. Now, our law says he is still guilty of capital murder because he walked in and robbed the store and he has killed the clerk. So he is still guilty of capital murder, but is he going to get life or going to get

death. That is an issue for you to decide and if you look at that situation, you are faced with a situation where the clerk, if he hadn't pulled that pistol from under the counter and gone after him, the defendant, he never would have been hurt. Do you see what I am talking about, Mr. Pryor?

A Yes.

Q So you might say well, the clerk, the person who was killed did help provoke the situation by pulling the gun out from under the counter and going after the defendant, so he helped to provoke the difficulty, and in looking at that, you might say well, the defendant really wasn't unreasonable in taking his life, because the clerk helped to contribute to or provoke difficulty that resulted in his death. Do you [p. 1141] see what I am driving at, Mr. Pryor?

A Yes.

Q On the other hand, you might have that cold-blooded killing we were talking about where he walks in and guns the clerk down in cold-blood and the clerk doesn't have anything in his hand and doesn't do anything to provoke the defendant. You very well might say Mr. Defendant, we find your conduct was unreasonable in taking the person's life because he didn't do anything to provoke it, and you very well might answer that yes and once again, all yes answers mean the death penalty, and one no answer on any one of those questions by ten or more of the jurors means life in the penitentiary, and not death. Do you understand, Mr. Pryor?

A Yes.

Q Any questions about what we have talked about?

A No, Sir.

Q Okay, that pretty much sums up everything I want to talk to you about. As I told you when I talked to you as a group, each of the lawyers get a chance to talk to you to see how you feel. Mr. Hobbs, the Assistant District Attorney will talk to you first, and then Mr. Mock, who [p. 1142] is seated at Counsel table will talk to you next. Mr. Hobbs, you may proceed.

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Thank you, Your Honor. Good morning, Mr. Pryor. In looking at the form you filled out for us, I see that you are presently working at Continental Group as a band press operator. What do they manufacture, sir?

A Paper drums.

Q And prior to that you worked for N.L. Atlas Bradford?

A That was a machine shop.

Q Before you worked for Atlas Bradford, who did you work for?

A P.S.I.

Q How long did you work for them?

A About six years.

Q P.S.I. is plastics?

A No, it is a paper company.

Q Out off Almeda?

A This one is off of 90.

Q You understand our law in the State of Texas an individual when he reaches the age of seventeen [p. 1143] male or female, is considered an adult for all purposes of the law, and subject to the penalties as an adult. Would the age of an individual, say, someone that is young, seventeen – eighteen – nineteen years of age cause you to look at that person differently than you would someone that was older?

A No.

Q So in your mind a person that is seventeen is just – should be treated just like somebody that is thirty-five or forty or fifty years of age?

A Yes, sir.

Q Now, the Judge has talked to you about various parts, what the burden of proof is, that is beyond a reasonable doubt, not beyond all doubt or beyond a shadow of a doubt. If it was beyond all doubt I think that you would have to be there and actually see what happened and if you were, you would be a witness and not a juror.

A Yes, sir.

Q And what must the State prove beyond a reasonable doubt? That is the elements of the offense. Do you remember what the Judge read through the indictment, that it was the defendant, [p. 1144] Gary Graham; that it

occurred in Harris County, Texas; that it was on or about May 13, 1981; and that while in the course of committing or attempting to commit the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. That is what the State must prove to you beyond a reasonable doubt. That and only that. Do you have any problems with that, sir?

A No, sir.

Q Now, looking at – I can go – in a capital murder we are also – always looking at murder plus some other crime, here, aggravated robbery, or robbery. And robbery is defined in our code under the law as a person commits the offense of robbery if, in the course of committing theft and with intent to obtain and maintain control of the property, he intentionally, knowingly or recklessly causes bodily injury to another or places another in fear of imminent bodily injury or death, and if that person causes serious bodily injury, or uses a deadly weapon, uses or exhibits a deadly weapon, it becomes aggravated robbery. Now, in the course [p. 1145] of committing theft, that means conduct that occurs in an attempt to commit, during the commission of or in the immediate flight thereafter of the attempt or commission of the theft. So, in a robbery, we are also having theft, plus some actions on the part of the defendant. Say, you had this pen and I want it. You have it and I came up to you and stuck a gun and say I want that pen. A police officer comes up behind me and sticks a gun behind my head. I have already committed the offense of aggravated robbery, and I haven't got anything. Any problems with that?

A No, sir.

Q Further, you could have the pen and I could take it away from you and you could come up and touch me on the shoulder and I turn around and pull a gun, and I have committed theft, but it was after I committed it and started away that I committed the robbery, when I used the force or threatened you. Do you have any problems with that?

A No.

Q In your mind, sir, is the offense of murder in conjunction with robbery the proper kind of [p. 1146] offense that you, as a potential juror, not knowing what the facts are, that you could consider the death penalty being a proper case.

MR. MOCK: We are going to object at this time to that, as being an improper question. It calls for a conclusion on the part of the potential juror prior to hearing any evidence, and it is based on speculation and conjecture.

THE COURT: Sustained.

Q I'm going to give you a hypothetical question to use in discussing the next issue that we have, and we are still in the first part of the trial, out of the two parts, guilt or innocence phase. Needless to say, if the defendant is found not guilty, we don't even get into the punishment phase. Now let us presume that this room is the Seven-Eleven Store, and that you are present in about the position that you are now. You have a little bit of trouble seeing Mr. Pollinger, the Bailiff over here, don't you?

A Yes.

Q You have got an obstruction. You can see a little bit of him, but not fully what he is doing over there. Further, let us presume there [p. 1147] is an individual, Mr. Orte, is present here about where he is a with an obstruction such as this, this rail. Furthermore, let us presume that Mr. Thornton is where he is at. Okay?

A Okay.

Q I am going to be the person that is committing the offense. And I come in, and let us further presume that the Bailiff, Mr. Pollinger, is just about at the end of his shift. He has taken money out of the register after he has checked his receipts, and placed his money for the drop in a drop bag, one of these bank drop bags, and he has got a coat on where part of it is sticking up, where you can see it is a money bag, and it's got something in it, and further, he is in the process of stocking the shelves and holding a box and putting things in behind the register in the shelf there. Okay?

A Okay.

Q I walk in. I see what he is doing, and I see the money bag. I approach him, and I reach for the money bag, and when he sees me come, he turns. He moves away from me. I grab him and [p. 1148] at that time I pull a pistol. Mr. Orte is watching me, and as soon as he sees the pistol, he is watching that pistol. He hits the floor. He sees the pistol and he hits the floor. Mr. Thornton sees me and he sees I am moving the gun up toward Mr. Pollinger's head, and he hollers at me, and I turn and when I see him, Mr. Pollinger backs away from me, gets away from me. I turn and I shoot and kill him. I run out of the store. You haven't got a good look at me because of

where you are at. This man has hit the floor and can't see. Mr. Pollinger is dead, so Mr. Thornton – I'm caught later on. Let's further presume that they didn't get the gun I used. They didn't get anything that I might have taken from the store, and I didn't leave any fingerprints. Okay?

A Okay.

Q Now Mr. Thornton takes the stand and testifies during my trial for capital murder, because I have committed a murder during the course of committing robbery, and he said Carl Hobbs is the person that shot and killed Mr. Pollinger on the day in question. And furthermore, let's [p. 1149] presume that you have found the State has proved to you beyond a reasonable doubt each and every other element. Okay?

A Okay.

Q Now, the question here with Mr. Thornton on the stand is he is a single eyewitness. He is the only person that can say that I did the offense. You didn't see me. Mr. Orte didn't see me. You saw parts of me, but he is watching the gun, and he is the only one that looked at me. Could you, if you believed beyond a reasonable doubt that the State had proved each one of those elements to you base a conviction for capital murder on the testimony of a single eyewitness, in that case in the example of Mr. Thornton?

A Yes.

Q If you believed it beyond a reasonable doubt, sir?

A Yes.

Q Irregardless of what the age of the person was, my age and when I committed the offense?

A Yes.

Q Now, going into the second part of the trial, now, I have been found guilty of capital murder. [p. 1150] So we are going into the punishment phase. And we are going to be looking at the special issues. Now, besides the evidence that you have from the first part of the trial, which you can consider in the second part of the trial, and have to in order to answer the questions, the Judge can, at his discretion, allow the jury to hear testimony that he deems relevant under the law for the jury to hear in answering the questions that they have to answer in the second part of the trial. Okay?

A Okay.

Q That is reputation witnesses that the Judge told you, if any, either good or bad; other acts of criminal violence, if any, and any prior record, if any, that I might have had in the example that I gave. Now, special issue number one, whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased would result. The Judge told you it would not be defined, deliberately. Deliberately, in my mind, doesn't mean premeditation. Does it in yours?

[p. 1151] A No.

Q Webster's Dictionary defines it as being a voluntary or willful act, not an accident. He intended to do what he wanted to do. If I go back and cash a deliberate act in my mind can be something that is done quick,

without much thought. If I go out and pick this pen up, I have deliberately done an act. Now, the second phase of that question is whether or not there was a reasonable expectation that the death of the deceased would occur. Let us presume that in the example that after Mr. Thornton hollered at me, and Mr. Pollinger got away from me, you stepped back a few feet. I turned and shot him in the chest. Okay?

A Okay.

Q Now, you have to look, based upon the evidence that you heard there, to see whether or not the action was done deliberately. Secondly, whether or not there was a reasonable expectation that the death of Mr. Pollinger would result from my actions. This is an example. We can't go into the real facts of the case. I think that you can see if I would have shot him in the foot deliberately, I could deliberately shoot [p. 1152] him in the foot and not expect that he would die, but if I turn and delibe ·tely shoot him in the chest or head, that puts a different answer to that. Would you agree, sir?

A Yes, sir.

Q Now, this one you have to look at the evidence, at the Case in Chief. Now, we are going down to the second one. Once again, whether or not there is a probability that the defendant – whether the defendant would commit criminal – whether there is a probability that the defendant would commit criminal acts of violence in the future that would constitute a continuing threat to society. Would you agree with me that people that are confined in prison or in jail are also part of our society?

A Yes.

Q Say a police officer or a guard there or even the prisoners, as part of our society. Now, probability doesn't mean absolutely. One hundred percent. Likely. Possible. Some of the things that come to my mind. Do you have a definition for probability, sir?

A No.

Q Okay, now, as to this special issue, now, [p. 1153] criminal acts of violence, from anything from minor assault, scratching your car, breaking out your window, to robbery, murder, rape, what have you. Do you have any problem with that, sir?

A No.

Q Now, as to these other things, reputation, prior criminal record, any criminal acts of violence, if any, would go along with the facts of the case to help you answer this. You can see that. Would you have any problem with that, sir?

A No, sir.

Q Okay, or the concept of probability, it's not something that is definitely going to happen, but it is probable, likely that this person is going to do it. Now, as the Judge told you, the State has the burden here to prove these beyond a reasonable doubt. If you believe beyond a reasonable doubt that the evidence said that your answer should be yes as to special issue number one and yes as to special issue number two, knowing that the death penalty would result if you answered that yes, would you, if you believed beyond a reasonable doubt [p. 1154]

answer them yes, knowing that the death penalty would be assessed by the Court

A Yes.

Q Okay. Now, special issue number three comes up only if it is raised by the evidence, and here, we are going to be looking at what in the example that I used, what I did and what Mr. Pollinger did. Okay?

A Okay.

Q Now, we are going to look at whether or not there was any provocation. Now, you have to decide that as a juror, based upon the evidence that you heard there. One situation is in the example that I gave you. In your mind, if it was presented to you, you would have to consider whether or not just turning away from me when I was grabbing for the thing was provocation, if it was, and that when I shot him, was I reasonable, just because he pulled away from me. That is one example. Now, let's go to another extreme. Say, the example that the Judge gave you, say that I pulled the money out of his pocket or tried to, and headed for the door, and I got to the door and he shot me in the back. I got up and I was almost out the door, he shot [p. 1155] and hit me in the leg again, and I saw him coming around the counter with the pistol, moving toward me, starting to cock the pistol, and I shoot and kill him. Now, his actions might say that that is provocation. It might or might not. You have to decide. And then, were my actions reasonable in that instance, as an example. But could you, and do you see how you would go about answering that question as a juror?

A Yes.

Q Do you have any problems with that?

A No, sir.

Q You have to decide was there any provocation, and was my action reasonable in killing whoever I killed, if it's even raised by the evidence. First of all, you have to decide was it provocation. You might not say it was from the evidence. If it was not provocation, then the action is unreasonable, and if you say it was provocation, then you have to ask was my reaction in reference to that provocation reasonable or unreasonable. Any problem with that?

A No, sir.

[p. 1156] Q If a yes answer here on all three of them it's automatic death penalty imposed by the Court. It is according to the jury answers. Now, is there any reason, sir, that you feel that in this type of a case that you couldn't be a fair juror?

A No.

Q How long have you believed, sir, that the death penalty in a proper case was a proper punishment?

A Well, ever since, you know, they brought it back. I don't know the exact time. If a person, in my mind, if a person took something and it's proven to me that he did it in the way, he already did something wrong, and if he done it in a way that it seemed he did it on purpose, I mean, a reasonable doubt that he done it, I don't have no opposition of the death penalty, so if he done it, I just say he is guilty.

Q Okay, now, that person, you would look at these special issues, and you wouldn't automatically vote yes, you would look at the evidence that was there, sir?

A Yes, I look at the evidence.

Q All right, and in your mind, as to special issue [p. 1157] number two, could the facts of the case, itself, be bad enough for you to make a judgment on an individual's probability of doing something and by the way he committed the acts he did, and you found him guilty of it?

A Well, I would have to look at all the evidence, you know, in my mind, before I could answer the number two yes.

THE COURT: Anything further, Mr. Hobbs?

MR. HOBBS: The State will pass the prospective juror.

MR. MOCK: Thank you very much, Your Honor.

[p. 1158] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q Mr. Pryor, you are not related to Richard Pryor, are you?

A No, sir.

Q Are you a native Houstonian, sir?

A No, sir.

Q What part of town did you grow up in, Mr. Pryor, Sedagest?

A Yes, sir.

Q You have three children, sir?

A Yes.

Q Let me ask you this: what does a band press operator do, just for my own edification.

A We make paper drums. It's a round tube and the machine I run that puts the seal on each end.

Q Those big barrels of paper?

A I put the seal on each end of them.

Q And how long have you worked there, sir?

A Almost a year, be a year next month.

Q Okay, you indicated you are a Baptist. What church do you attend?

A Bethany Baptist Church.

Q Do you attend regularly?

[p. 1159] A Abou three weeks out of the month.

Q Do you have any problems in your religious beliefs with your beliefs with regard to the death penalty?

A No sir, no problem.

Q You indicated that nobody in your immediate family or close associations have been victims of crimes, sir, is that a fact, nobody has?

A No, sir.

Q What part of town do you live in now, sir?

A I stay in the same area I stay on 10 off Maxie.

Q You live in the same part of the city that you grew up in?

A Yes, sir.

Q I would like to talk with you, sir, briefly about the charge here and several other things. It's no doubt we are talking about a capital murder. The end result if the defendant is found guilty of the offense as charged, and we go into the punishment phase, we are talking about a capital offense where the only two punishments is – can be life or death. Do you, sir, knowing that, have anything that would be so repugnant about the capital offense as to the [p. 1160] way they are committed, that you could not listen as a fair and impartial juror on a case of this type?

A No, sir.

Q Now, you understand that Gary Graham, as he sits here, is presumed to be innocent until proven guilty beyond a reasonable doubt?

A Yes, sir.

Q Could you, sir, give him that presumption of innocence?

A Yes sir, if proven.

Q Sir?

A If proven.

Q Would you be fair and impartial and give him that presumption of innocence until all the evidence is in, you have heard all of the facts and then you make up your mind as to whether he was guilty or not?

A Yes, sir.

Q You give him that presumption?

A Yes, sir.

Q Also, sir, this is the kind of case that is the only type of case where a defendant cannot waive or give up his right to a jury trial and have his case heard before a Judge. This also [p. 1161] means he doesn't have a right at the punishment phase, as in most cases, to have a Judge or the Court assess punishment. The Code of Criminal Procedure states that it must be done by a jury. Toward that end, we are discussing with you your views on capital punishment, and feelings of this assessment in a proper case, since you have said you could do it. However, we are also mandated by the Code of Criminal Appeals to discuss these issues prior to a finding of guilt. I would ask you, sir, would you think that because we are going ahead to discuss the issue of punishment, as mandated by the Code of Criminal Procedure, that you might think that the defendant must already be guilty or we wouldn't be placing such an emphasis on the punishment phase of the trial, if we get there?

A No.

Q So, you wouldn't hold it against him that we are talking punishment before we even get there?

A No, sir.

Q Okay, now, you indicated, sir, that you have had your feelings about the assessment of the death penalty as a punishment to be proper since [p. 1162] it came back. Have you kept up with the issue of the death penalty or death as punishment in a proper case?

A Well, I haven't really kept up, the only thing I know when I watch t.v., I watch the news a lot, and I see things that happen as far as just generally, knowing everything about it, I don't.

Q But you are aware that the death penalty at one time was abolished or stayed and now it has been reinstated as a form of punishment in a proper case?

A Yes, sir.

Q And you had no problem with the assessment of that punishment in a proper case?

A No, sir.

Q Now, you said you have had that feeling since it came out, not trying to pin you down as to exactly any time or date that you might have come to feel that way, can you, sir, tell me if you have discussed the assessment of the death penalty with others?

A No sir, not really.

Q So this is purely a feeling that has developed within your own growing and living on earth and [p. 1163] seeing circumstances around you change to feel that it would be a proper case, the proper punishment, if warranted by the facts of the case?

A Yes.

Q Okay, as relates to issue number one on the board, do you understand, sir, that it's connected by the conjunction and and [sic] it's whether the conduct of the defendant that caused the death was committed deliberately and along with that, it was done with a reasonable expectation that some death of the deceased or somebody else would occur?

A Yes sir, I understand that.

Q Would you be able to, sir, separate and, and separate those issues and answer both of those questions prior to answering the answers to special issue number one?

A Yes, sir.

Q And you wouldn't think that just because someone was killed, excuse me, someone was shot or stabbed deliberately that the person who did that act automatically had a reasonable expectation that death would occur?

A I understand. I mean, you may have to explain [p. 1164] it, but in that I wouldn't, because of the first half of it, I wouldn't just consider him guilty for the second half.

Q You would analyze and determine them in your mind?

A Yes, sir.

Q Number two goes to probability, as you have been told by two others, and briefly, sir, what kind of information would you like to have brought to you, if possible, to assist you in making the determination as to

whether one would continue to commit criminal acts of violence and be a continuing threat to society?

A Mostly, I would like to know some of his background, prior to this case, what kind of person he was, in general.

Q Would you like to have, sir, all the data that would be available to you from the neighborhood, the upbringing and any other things that might be pertinent or relevant to this individual before you would make that type of decision?

A Yes sir, I would like to know that before I make that decision.

Q So you wouldn't automatically think that because you answered yes to issue number one, that [p. 1165] you would automatically answer yes to issue number two?

A No, sir.

Q You keep them separate and apart?

A Yes, sir.

Q And you would look at this individual?

A Individually.

Q Okay, when answering those questions, sir, could you divorce your emotions from the end result, knowing what the end result would be, and vote on those issues, based on the evidence presented to you and that evidence alone?

A Yes, sir.

Q And not become emotionally involved, if it is a person and you don't want to kill somebody?

A Yes sir, I can answer that. I can, you know, I wouldn't just say the person was guilty in any case. I would like to see all of the facts before I decide anything.

Q And if you saw the facts, you could vote for death if it were the proper punishment.

A If it was the proper punishment.

Q Okay, number three issue that is on the board there. That goes to provocation. Do you understand, sir, what the Judge has explained [p. 1166] to you about the fact that there is no self-defense that can be claimed during the commission of any offense that would lead to capital murder?

A Yes, sir.

Q But there may be something that the deceased person did, which in the end causes – caused his death or advanced the situation to such a degree that he was killed or she was killed.

A I understand that.

Q Can you, sir, envision in your mind a set of circumstances where the actions of a defendant might be reasonable in light of any provocation that was done by someone?

A Explain that last part, again, the way you said it.

Q Can you envision in your mind, conceive of a set of circumstances where somebody got killed if they are in their own place of business, protecting their own property, as they have a right to do, and they were killed as a result of something they did that ended up provoking the

situation or making the situation worse where the defendant or the person charged with the offense killed him?

[p. 1167] A Yes sir, I understand that. Okay. I'm getting it the way you are saying, but –

Q If I am confusing you –

A You are confusing that.

Q I'm not trying to confuse you. Let me try again. Maybe if I give you an example?

A Okay.

Q I am in my place of business that I have worked hard for, and I have a right to be there. I have property there. Someone comes in to rob me. In an effort to protect my property, I say I am not going to take this. It may be dumb. It may be stupid. We won't be able to determine that. That is not the reason for it. Okay?

A Okay.

Q But I am not going to allow this to happen for me – for this property that I worked for so I make a reach for something under the counter. We don't know what it was. We have not seen anything. There is no evidence that anything is ever picked up, but when I make that sudden reach under the counter, the person over there robbing me shoots me. As a result, I die. It could be if I had not reached under the counter [p. 1168] or made that sudden reach for whatever I reached for, that I would still be alive. But I did something in making that lunge, which was provocation. Provocation does not have to be touching or hitting or fighting, necessarily, but I did something that provoked the incident further, which resulted in my

death. Can you, sir, in your mind, visualize a set of circumstances where that killing might be a reasonable action or reaction of the defendant to my provocation by reaching?

A Yes, sir. I understand. I'm still getting it wrong. I don't know why I'm getting it wrong, but – you are telling me the answer, but telling me – asking me the question, but I'm still not getting it.

THE COURT: Let me take a run at it, Mr. Mock. That is what I was telling you. This is the hardest one that I find to understand. What Mr. Mock is trying to get across, everyone agrees that if you have something, it is yours, you think about how the store owner reacts with the robber coming in and he takes the money and he does something to keep the robber from taking the money. The example that Mr. Hobbs gave you, [p. 1169] shooting the robber on the way out the door or the one Mr. Mock gave you where he just lunges under the counter with the pistol. You could say well, in some way, he has added to the problem that resulted in his death, be it in either example, whatever you want to use, but what Mr. Mock is then saying, you can think in your situation, be it the one I gave or Mr. Hobbs gave, where the robber is on the way out the door, and he hasn't hurt anybody, and the clerk shoots him in the back. Can you think of a situation where you would say that the defendant was not unreasonable in taking his life? In other words, that the person who is killed really, more of [sic] less, brought on the fact that he is killed. It was his conduct that caused the death and not the defendant, was unreasonable in killing him. Let me go a little further. We are not saying, once again, we are not saying the defendant is justified in killing

anybody. We are not saying that. What we are saying is can you consider this and if the answer should be no, answer it no because you are dealing with taking a person's life in capital punishment. No one is excusing what [p. 1170] the defendant did. We are saying did the person who was killed contribute to the fact he died and was the defendant unreasonable in killing him because the clerk did what he did. Is it any clearer to you now?

A No. I understand, and it is still hard and I understand what you are trying to ask me.

THE COURT: Nobody is asking you to make up a set of facts, but can you have an open mind on that set of issues, can you?

A Yes in some and no in others.

EXAMINATION CONTINUING BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q That is basically what we want. Can you have an open mind on all the issues separately and individually and answer each issue as it is raised and presented separately?

A Yes, sir. I understand.

Q Is there any reason, sir, that you could not be a fair and impartial juror in the trial of this case?

A No, sir.

MR. MOCK: That is all we have.

[p. 1171] THE COURT: All right, what says the State, Mr. Hobbs?

MR. HOBBS: The State will accept.

THE COURT: What says the Defense?

MR. MOCK: We will accept, Judge.

THE COURT: Mr. Pryor, you are going to be a juror in this case. Will you stand and raise you [sic] right hand?

(At this time juror sworn)

THE COURT: Mr. Pryor, now this is going to conclude your having to be here today. We anticipate that we are going to finish picking the jury this week. You are juror number eight, and we have four more to go. We have gone through twenty-six people before we got to you, so you are free to go on back to your job out there at Continental Group, Inc. and we have got your phone numbers. You have a business phone number at that company you work at?

A Yes, 675-8241.

THE COURT: Now, we anticipate that we are going to start testimony a week from today. We think it will be next Monday when we get started. We anticipate the trial is [p. 1172] going to take a week to try. So, you will have to be here for all of next week, if we start next Monday. We will certainly, when you leave, we will give you written verification to give to your people out there to show you have been here on jury duty, and you can tell them we will be going to trial on Monday the 26th, a week from today, and we think it is going to take a week, but you have been chosen as a juror in this case. Ms. Hamilton will provide that verification for you. If

anything comes up where you need to get in contact with us, Mr. Pollinger will give you a name and phone number to call up. Thank you.

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[p. 1266] MR. BEN DENT BRADLEY, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY COURT

Q Good afternoon Mr. Bradley. Sir, in looking at your juror information form, it reflects that you have not had any prior civil or criminal jury service, is that correct, sir?

A That is correct.

Q I know that, and I noticed in looking at your juror information form that you work for Cy Fairbanks Independent School District as their Director of Security. Let me ask you this. We anticipate, Mr. Bradley, that we will be in testimony on this case next Monday, and we think that it will take a week for the evidence to be completed, so it will probably be approximately one week away from your job. Do you have an assistant out of the school district that could carry on in your absence while you were in trial?

A I'm sure they could.

Q All right, sir, so we will not create an insurmountable hardship for you?

[p. 1267] A No.

Q Was there anything about what I talked about before lunch with regard to principles that govern the trial of a criminal case that were unclear to you or I need to speak about further?

A No.

Q As I told you before lunch, this is a capital murder trial. If you serve as a juror in this case, there is a possibility that you would be placed in a situation where you would have to vote your conscience based on the evidence that was presented on the punishment phase of the trial, and that would present only two alternatives on the punishment phase. Once again, as I told you earlier, the only alternatives for punishment in a capital murder case are death by lethal injection or life in the Texas Department of Corrections. Do you feel, sir, that you could participate in that verdict if you felt it was a proper case where the death penalty was assessed as punishment?

A Yes, I feel that I could.

Q It is obviously not something that anybody [p. 1268] wants to do. The question is could you serve on a jury in that case. I take it, then, by your answer, Mr. Bradley, that you do not have any conscientious, religious or moral scruples against the imposition of the death penalty as punishment in a case that you thought would be a proper case for capital punishment, is that right, sir?

A That is right.

Q Let me give you a little general discussion about the punishment phase in a capital murder case, and then we will speak specifically. The State of Texas has the burden of proof in the punishment phase of the trial, just as it does in the guilt or innocence phase. The State, in seeking the death penalty, must prove to you beyond a reasonable doubt that the death penalty is the proper

punishment. The defense has no burden to present any testimony. They have no burden to convince you, other than the death penalty is not proper punishment. All the burden is on the State. There is no shroud of secrecy surrounding the jury's verdict. The jury does not go back in the [p. 1269] jury room and roll dice and that determines what the verdict is. There are two special issues that are presented to the jury, and it is the manner in which they are answered that dictate to the Judge what the punishment is going to be. The Judge does not have any discretion to change the verdict one way or the other. And it is the way in which these special issues are answered by the jury that determine what the defendant is going to receive as punishment, be it life in the penitentiary or death. Assume that you have found the defendant guilty of capital murder. You have found that while in the course of committing a felony offense he took the life of another human being. You are convinced beyond a reasonable doubt. You now are in the punishment phase of the case. It then becomes your decision after the testimony is presented upon the punishment phase of the trial to decide what the punishment should be. The first special issue that you will have to consider will probably cause you to think back upon the testimony that you heard in the guilt phase of the trial, and for you to deliberate [p. 1270] once again upon the conduct of the defendant that resulted in the taking of the life of another human being. That is the first special issue that is placed on the bulletin board behind you. Will you take a moment to read that, Mr. Bradley, and then we will speak about it. In looking at the first special issue we are asking you if the conduct of the defendant that caused the death of the

deceased was, number one, done deliberately, and number two, did the deceased or did the defendant reasonably expect that the conduct would result in the death of the deceased or another person. There will be no definitions that I will give you to assist you in your deliberations on any of these special issues. They will all require that you use your common definitions and common sense in answering these issues. But I think they are fairly uniform definitions as to what these words mean. Deliberately, in my mind, means that it is a person's conscious objective to do something. He intended to do something. He voluntarily goes forth in committing that act. It is not an accidental [p. 1271] act. It is not necessarily a premeditated act. It is something that he intended to do and does, and secondly, did he reasonably expect that the death of the deceased or another person would occur. There are many examples that we can give to you to show you ways that you might answer yes sometimes and ways you might answer no in other times. I can think of at least three situations that may require different answers. Assume that someone goes into a U-Totem Store out in Cypress Fairbanks to take money because he has a sick family and can't get money any other way, doesn't intend to hurt anybody, never intended to, doesn't intend to start now. That is the only way to get money. He goes into the store and trips on a banana peel that someone left lying on the floor, slips on it and looses [sic] his balance and the gun flies out of his hand, hits the floor and accidentally discharges and the clerk behind the counter is struck and is killed. He is guilty of capital murder. When it comes time for you to review that person's reasonablness [sic] that another person might do, you

might answer that [p. 1272] no that he didn't reasonably expect to kill someone. On the contrary, you may have a cold blooded killing where a clerk is gunned down at gunpoint in cold blood. You might answer that yes, that the defendant did intend to commit a deliberate act and he reasonably expected the death would occur. Third possibility might be where a person robs the store and the clerk starts out at him and he shoots the clerk in the foot to keep him from following him. The clerk falls out after having been shot in the foot and hits his head on the counter and dies. You might possibly say well, he didn't expect that the clerk would die because he shot him in the foot. It is just some freak thing that happened. There are many situations that dictate different answers?

A Yes.

Q The second special issue deals with you being called upon to predict the future to the degree of probability. If you would take a moment to look at the third special issue. We are asking you – once again, there will be no definition of terms – we are asking you [p. 1273] the probability. The degree of probability, is it more likely than not, possible 51%. Is it probable that the defendant will commit criminal acts of violence that constitute a continuing threat to society. Acts of violence mean many different things, from someone pushing one of your students, possibly from the back and if that student finds it offensive, the person who does the pushing is guilty of a Class C misdemeanor offense of assault, to the opposite end of the spectrum of capital murder, and many things in between. Offenses against persons, rape, kidnapping, robbery, crimes against property. Slashing of tires. The throwing of paint on paint jobs. These are criminal acts of

violence that involve property, but nonetheless are still acts of violence, and possibly might fall within this group. And is the defendant probably going to commit these acts that he commits that will constitute a continuing threat or ongoing threat to society. Once again, we are seeking to find 12 people who will have an open mind on all of these issues until the evidence is complete. We do not [p. 1274] want 12 people who are going to, as a knee jerk response, vote for the death penalty, merely because they found someone guilty of capital murder. By the same token, we do not want 12 people who are automatically going to vote for life in prison, no matter what the State presents. We need to find 12 people who say they can consider the imposition of the death penalty in a proper case, and if the State proves to them beyond a reasonable doubt that these issues should be answered yes, then answer those issues yes. Do you feel you are within that group, sir?

A Yes, I feel that way.

Q I don't know if I told you or not, Mr. Bradley, a yes answer by the verdict requires a unanimous answer. All 12 must agree the answer should be yes. A no answer requires a vote of 10 or more. If 11 people say the answer should be no or 10 people say the answer should be no, then the answer is no. A no answer on any one of these special issues dictates to the Court that life in the penitentiary is the jury's recommendation. [p. 1275] All yes answers mean the death penalty. There is – strike that – there are types of evidence that may be presented to a jury on the punishment phase of the trial relative to the second issue that will assist the jury in its deliberations as to whether or not the defendant probably will commit

these acts of violence in the future. You are entitled to hear other testimony relative to past criminal record, relative to other criminal offenses that the defendant may have committed, and relative to the opinion concerning the defendant as expressed by other people from the community. On the contrary, it may be all things good. No criminal record and people have nothing but good things to say about him. So once again, there are many situations that dictate different answers because of the conduct or lack of conduct in the testimony that is presented to you as jurors. Those two issues are presented in the punishment phase of every capital murder trial. There is possibly a third special issue that will be presented to the jury in this case. We do not know if it will or not [p. 1276] because the evidence is not going to present it. If you would take a moment and read the third special issue, Mr. Bradley, and then we will speak about it?

A All right.

Q The first thing I want to point out about this special issue is the fact that it is only presented if it is raised by the evidence. If it is not raised by the evidence, it is not presented. Unlike the first two, they are presented one way or the other every time. Special issue number three calls upon you, if it is raised by the evidence, to compare the actions of the defendant and the deceased prior to the deceased's death. We are asking you if the defendant, in taking the life of the deceased, acted unreasonably in light of provocation, if any, that the deceased committed prior to his death. We are not saying that the defendant is entitled to a self defense charge. He is not entitled to sympathy for defending himself when

he had provoked the difficulty in the first place by walking in the store with the loaded pistol. He has provoked the difficulty. He can't claim [p. 1277] self defense. Where our law deems it proper for a jury to consider testimony about the deceased provocation in a situation is when you are faced with the dilemma of life or death. Our Legislature has deemed this to be something that a jury might consider in assessing life or death. Once again, go back to our situation where the person has gone in to rob but not to kill. He has taken the money and replaces the pistol in his belt and is walking out of the store when the deceased, from under the counter, pulls a pistol and fires and hits him in the shoulder. The defendant falls to the ground and the deceased comes from behind the counter with the pistol drawn and aims to shoot again and the deceased, in self preservation, fires back and takes the life of the deceased. We are not, once again, condoning the actions of the defendant, number one, in the robbery or number two, taking the life of the deceased, but what we are saying is if the deceased had not, in essence, provoked the difficulty by coming out from under the counter with the pistol and going out after the defendant, he would not have died. [p. 1278] So was there some provocation on the deceased's behalf prior to his killing. Once again, we are not inpugning [sic] any ill will or criminal intent on behalf of the deceased. That rests with the defendant, and what we are saying is please consider whatever testimony, if it is appropriate pertaining to this and compare the two individuals' conduct in the matter in determining whether or not the defendant acted unreasonable in taking the life of the deceased. It kind of flies in the face of the right to defend your property, but once

again, the importance of the decision outweighs these past judgments that are ingrained in our consciousness, and that is the ultimate decision of whether or not the defendant lives or dies. So you see the thrust that I'm trying to make with regard to this special issue?

A Yes, I do.

Q Do you have any questions, Mr. Bradley, about anything we have talked about so far?

A No.

Q Do you feel these issues are clear to you?

A Yes.

[p. 1279] Q That concludes the comments I wish to make. Mr. Hobbs, the Assistant District Attorney and then Mr. Thornton, I believe Mr. Mock on behalf of the defense will question you. Mr. Hobbs, you may proceed.

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Thank you, Your Honor. Good afternoon, Mr. Bradley. The people that are here, this is Mr. Mike Addudel and two people in the jury box are Ms. Northcutt and Mr. Orte that are legal interns, law students. Sir, as mentioned earlier and the Court hasn't instructed you, but as a potential juror, the attorneys cannot speak to you on that and we are not trying to be rude or anything of that nature, so earlier when I said I couldn't speak to you, I hope you can understand. Sir, have we met before. I seem to have remembered you from a couple of years back?

A I have been trying to think of, I recognize your face, and I think what it had to do with –

Q While you were working for the Houston [p. 1280] Teachers Credit Union Association, I think you had someone that was fraudulently using your name?

A That is what it was.

Q Would that in any way affect your decision based upon that incident and the facts of this case?

A None whatsoever.

Q Okay. Now, you had told the Judge you could in a proper case be a party as a juror in assessing the death penalty. Is there any set or type of case that would preclude you from considering it as part of a capital case? Now, you have heard the Judge read the indictment to you. Not knowing any of the facts and you won't know any of the facts in this unless you are a juror, just the offense of aggravated robbery and a death allegedly being taken during the course of that robbery, is that type of – a type of case that you would – if you believed beyond a reasonable doubt that the State had proved that to you beyond that doubt, each and every element of that offense in a proper case, the type of offense that that could be [p. 1281] considered by you for the death penalty?

MR. MOCK: Your Honor, we would raise our same objection that is an improper question, calling for a conclusion, based on conjecture or speculation.

THE COURT: Sustained.

Q Now, the State's burden is beyond a reasonable doubt, not beyond all doubt. If it was beyond all doubt, you would have to have been a witness to it, and if you were a witness, you couldn't be a juror. Now, what does the State have to prove beyond a reasonable doubt? Those elements of the offense, and the Judge has read the indictment to you, but I want to go over it because it is important. If we don't get past the guilt stage, needless to say, there is nothing to worry about in the punishment stage. And that it is the defendant in this case, Gary Graham, in Harris County, Texas, on May 13, 1981, while in the course of committing and attempting to commit or attempting to commit the robbery of Bobby Grant Lambert, intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. Now, that is [p. 1282] what the State must prove beyond a reasonable doubt. That and only that. Do you have a problem with that, sir?

A No, I don't.

Q Okay, do you understand our law when an individual, which I am sure you are familiar with in your capacity now, reaches the afe [sic] of 17, that person is subject to the full extent of the law as an individual that is 35, 40 or 50 years of age. Would the mere youth of the defendant or an individual charged with a very serious crime affect you in the deliberations of the facts of the case, which that individual is alleged to have committed?

A No, I don't think it would.

Q Okay, now, you have children that are a little older than 17, some that are younger, and your children

are fairly young. That fact would not preclude you from sitting as a fair and impartial juror in a case?

A No, sir.

Q Now, I would like to give you a hypothetical situation that I will use in my next question as far as the first part of the trial. And I will also use in discussion of the special [p. 1283] issues in the second part of the trial. Now, let us presume that this room is a 7-Eleven store, and furthermore, that you are present in the store, and besides yourself, let us say there is Ms. Northcutt that is present in an area such as she is at with an obstruction, something similar to the railing here, and furthermore, Mr. Pollinger, the bailiff, is also present and behind the register, and is a cashier. Furthermore, that Mr. Thornton is also present in an area such as he is here where he can see both Ms. Northcutt and he can see you and he can see Mr. Pollinger. I think from where you are at now you have a little problem seeing Mr. Pollinger?

A Yes.

Q Let's presume there is an obstruction of some sort such as what you have right in this courtroom, and let us further presume that it is near the end of the shift, and Mr. Pollinger has closed out his shift's register, has taken the money from the register and prepared it for a drop and places it in a commercial drop bag. He is [p. 1284] wearing a coat. He slips that bag with the bills in it and places it in his coat pocket. A small portion of it is still showing, enough so that you can see it is the money bag and it has something in it. Furthermore, let us assume that he is in the process of behind the counter, behind the register, restocking the shelves for the next shift, and he

has got a box in one hand and placing items in the shelf. Let us further assume that I enter the store. I come up and I see Mr. Pollinger, and I see the money bag protruding from his coat pocket, and I know what it is. And I'm going to take it. Let us presume that I go up, I grab at the bag. Mr. Pollinger sees that I am there or senses me, turns, still holding the box and turns away from me. When he turns, I grab him with my hand, reach down and come up with a pistol. Let us presume further that Ms. Northcutt is watching. She has vaguely seen me, but when she sees the pistol, she is concentrating on the pistol, not me and not what I look like. She dives down, hits the floor. Further, you hear a commotion, maybe, might have saw me [p. 1285] just glanced and saw me come in through the door, but you don't see me, and what I look like. And then, Mr. Thornton is in a position that he is in now and that when he sees the gun, as I pull it, hollers at me, and when he hollers, I turn and look at him. Mr. Pollinger breaks from me. I turn and he gets several feet from me and I turn and shoot him and run out the door. Now, under our law, robbery can be committed without theft of any property being taken. As an example, if I walk up to you, sir, and pull a gun on you and demand your money, and a police officer came up behind me and stuck a gun in the back of my head, although I haven't got anything and I haven't done any more than what I have just explained, I have committed the offense of aggravated robbery. Do you have any problems with that?

A No.

Q Robbery is in the course of committing theft of property, which means conduct in an attempt to commit,

during the commission or in the immediate flight after. If I took something from your pocket, turned and walked away and [p. 1286] you turned around and touched me on the shoulder and I pull a gun, I have committed robbery there. Any problem there?

A No.

Q Going back to my question, let's presume further that I'm caught later on. I'm brought in and I'm being tried for the offense of capital murder because in the situation there I have taken the life of Mr. Pollinger in the course and commission and attempted commission of aggravated robbery. Do you have any problems there?

A No.

Q Now, let us further presume that the weapon that I used was not recovered, that I didn't leave any fingerprints or anything. Anything I took out of the store was not recovered. So when I am being tried, let us further presume that the State has proved beyond a reasonable doubt each and every one of the other elements of the offense, that it occurred in Harris County, that it was on or about a specific date, that it was during the course of a robbery and that the death of Mr. Pollinger resulted from an intentional [p. 1287] act upon the perpetrator's part in killing him with a gun. Okay, further that Mr. Thornton takes thestand [sic]. He takes the stand and testified under oath and points me out and says Carl Hobbs is the person that committed that robbery and shot and killed Mr. Pollinger. If you believed his testimony beyond a reasonable doubt, although there were three other people, I mean two other people besides Mr. Thornton there, Ms. Northcutt, who was down on the floor and only saw

a pistol, and you might have heard the commotion, but you didn't see anything. Now, put yourself in a position of a juror now. Based upon the testimony of a single eyewitness, if you believed that person beyond a reasonable doubt in that the State had proved the elements of the offense, the other elements of the offense beyond a reasonable doubt to you, could you base a verdict of conviction for the offense of capital murder on the testimony of a single eyewitness if you believed that person beyond a reasonable doubt?

A If I believed the person, absolutely, sure, I could.

[p. 1288] Q Now, would you require a greater burden of proof than that of beyond a reasonable doubt, as the law would require?

A No.

Q Okay, you would use your what the – the instructions that the law would give you to judge that witness as you would any other witness that was presented to you, not anything greater or anything more?

A I'm not sure I understand.

Q Okay, sir. Let us say that there was a police officer that came to the scene, and he testified as to the way he found things. you have a choice to believe part, all or none of what he testifies to. Would you place a greater burden of belief, a greater burden on the State and you, as a juror, to accept policer officer's testimony than you would Mr. Thornton's testimony, that I was the person that committed the offense?

A No.

Q Okay, and regardless of my age, if you believed that single witness, eyewitness, beyond a reasonable doubt, no matter if I was 17 or 60, would it make a difference?

[p. 1289] A No.

Q Now, going into the punishment phase of the case, sir, we are looking at special issue number one, whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased would result. As the Judge has told you, it is a two-part question. Deliberately is not defined. It doesn't mean premeditated, as the Judge has told you. It also doesn't mean accidentally. That is a given – Webster defines it as being a willful or voluntary act. Do you agree with that or do you have some definition that comes to your mind of deliberately?

A No.

Q A second part of that is reasonable expectation that the death of the deceased would result. Needless to say, in answering special issue number one, we are considering the evidence of the fact situation which the defendant, since we are in that punishment phase, has been found guilty of, and you are having to answer that question. Now, with a deliberate act [p. 1290] can be if I walked over to this water fountain and got this cup out and filled it partially, this is a deliberate act with little or no thought involved, other than the time it took to walk up there and to take it. Now, in looking at that deliberate act that caused the death of the deceased, was there reasonable expectation that the death of the deceased

would occur. Let us take our example I have given you in a hypothetical situation and further state that as I was going out the door and I turned, as I turned and shot Mr. Pollinger, I shot him in the chest, you might answer that question whether there was a reasonable expectation that death of the deceased would result from where I hit him or if I hit him in the head. On the other hand, as an example, sir, you may look at it, if there was, I could still deliberately do an act if I came back and as he was backing away I shot him in the foot, I committed a deliberate act, but there might be some question whether or not shooting that individual in the foot and say he fell and hit his head on the edge of the counter, [p. 1291] causing his death, but I reasonably expected that he would die as a result of me shooting him in the foot. Do you have any problem with that, sir?

A No.

Q Special issue number two, we come into the aspect of probability. Once again, a word that is not defined and in this second special issue is where the Court in its discretion can admit the evidence which the Court deems proper for the jury to hear in the second phase of the trial which can aid you in answering special issue number two. Would you agree, sir, that the fact of the case that you heard during the guilt stage of the trial gives you some insight as to the conduct in a given situation of the defendant in which you can go about answering special issue number two?

A Sure.

Q Now also, during that phase, as the Judge told you, it may consist of any prior criminal record, if any,

other criminal acts of violence, if any, and the Judge has defined that for you from simple assault to criminal [p. 1292] mischief to breaking a window, all the way up to aggravated robbery and murder and whatever. Probability, it is not an absolute certainty. Possible, likely, terms that come to my mind when I think about probability. Criminal acts of violence that would constitute a continuing threat to society. Broad sense of society. Taking in not only the test of a day to day test that each of us have here and the people in their work places here, but also taking into consideration those people that are confined in penal institutions are part of our society. Would you not agree, sir?

A Yes.

Q And looking at that probability of criminal acts of violence, that could be towards either to a prison guard, jailer, or other prisoners being held. Now do you have a problem in looking at those factors in being able to answer special issue number two?

A No, I don't.

Q Would you, sir, if you believed beyond a reasonable doubt, based upon the evidence that you heard in the case after hearing that [p. 1293] evidence, and you believed that the State has proved the answer to special issue number one should be yes, and that the answer to special issue number two should be yes, and they were the only two issues submitted to you, and there was a unanimous verdict by the jury, would you and could you participate in that unanimous verdict, knowing that death would be the result of that unanimous yes verdict on each answer, special issue one and two, by the Court?

A I think I could.

Q Okay, now, when you say you think you could, would there be a circumstance when you could not?

A Well, the thing that I'm concerned about is at least based on the kind of information you give me is how sure I would have to be about it. It would have to be beyond a reasonable doubt.

Q It wouldn't have to be beyond a shadow of a doubt. You wouldn't require the State to do more than that?

A That is right.

Q Now, considering the example that I used, in [p. 1294] discussing the questions I have been asking you, we have two things we have to consider there, sir, whether or not the conduct of the defendant, in the case of the example I was giving you, my conduct in killing the deceased, Mr. Pollinger, was unreasonable in response to any action or provocation on his part, if any. If there was provocation by the deceased, Mr. Pollinger, so the question you have to look at is you have to look at the actions of my actions and what I did in response and what, if any, actions Mr. Pollinger did, what did he do. Okay, when you decide from the evidence what he has done, you have to decide whether or not that was provocation, once again, you are using your good common sense. Now, in the situation I gave you, you may or may not feel that that is provocation, and then was the actions of him pulling away provocation, in the first place, and if it was provocation, was my reaction unreasonable in shooting him and killing him. Now, let's take it to a far extreme, as

kind of a contrast to that. Say that I managed to get the money bag from his [p. 1295] pocket, that I got to the front door and just as I reached the front door Mr. Pollinger shot me in the back. I fell to the floor and I got back up to my feet and pushed the door partially open and he shot me in the leg, and I fell again. As I fell this time, I turn and I saw him coming from behind the counter, holding the gun and starting, and him in the actions of cocking it back, I pulled the gun from my waist, shot and killed him. Now, in that sense, you might very well find that there was, in fact, provocation on my part, by getting the gun and shooting him when he shot me in the back and shot me in the leg and him coming from behind the counter and my actions was not unreasonable in shooting him. I don't have a right of self defense, but it might not have been unreasonable that I would, I shot him twice. He had shot me twice before I shot and killed him. Not that I'm not guilty of the offense of capital murder. In looking at those special issues, is there something that I have not asked you that you would like to know about?

[p. 1296] A I can't think of anything.

Q As to things we have discussed is there some area that I have muddied the water, have confused you about that you would like to ask a question about, sir?

A No.

Q Is there any reason, sir, that you feel you could not be fair in this kind of a case?

A Not that I can tell.

Q And in your capacity as a special agent, were you in intelligence for that entire 20 year period?

A No, I ran criminal investigations for about probably 10 years of that, background information.

Q As an armed agent, sir?

A Occasionally, not very often.

MR. HOBBS: Thank you. Pass the witness.

THE COURT: Mr. Mock?

[p. 1297] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q If it please the Court, Your Honor?

THE COURT: Yes, sir.

Q Mr. Bradley, you work for HISD, and now Cy Fair ISD. Do you know Les Burton?

A I know Les, but I'm not really acquainted with him, but I have spoken to him. I know who he is.

Q Your face is awful familiar to me, sir. Did you in the past 3 or 4 years be at HISD on the weekends?

A I don't recall any specific thing. I didn't work for HISD. I worked for Houston Area Teacher's Credit Union.

Q Which was right behind them at that time?

A It used to be on Richmond.

Q Before they moved way out there. I wonder if you remember my face. I used to work in security for Mr.

Burton at the back door. I wonder if you remember my face?

A I don't believe I recall.

Q Because I was at the credit union quite a bit?

A I might have seen you there.

[p. 1298] Okay. You attended Yale University, sir?

A Yes, for one year.

Q Okay, majored in language. Any special language?

A Yes, Japanese.

Q Now, you mentioned that you were a special agent?

A It was for the Department of Air Force.

Q Okay, so you worked directly for the Air Force, United States Air Force?

A Yes, sir.

Q This was, I assume, sir, after you had been released from service in the military?

A No, I was still active duty. I was in active duty for 26 years.

Q Okay, that is what I was trying to clear up. You were active duty in the Air Force for 26 years, 20 of those as an agent with the OSI. Were you a commissioned officer at that time?

A No.

Q Would you explain what the difference is as opposed to being a commissioned officer enlisted man type person with the military as opposed to the OSI?

A Okay. Well, the OSI does all the criminal [p. 1299] and counterintelligence investigations for the Air Force. We work in civilian clothes and our range at that time when we were doing this is classified because we also have enlisted people which I was an officer personnel doing the same type of work and because of that, you work in civilian clothes, and your identity or rating structure is kept quiet.

Q You were basically in the military?

A Absolutely.

Q All right now, the fact that you were involved as a special agent for 20 years, sir, there may be police officers that will testify. Would you, sir, give more credibility to a police officer's testimony just because he is a police officer and for no other reason than you would to a lay person's testimony?

A No, I don't think so.

Q Has your affiliation with an investigative branch of the military given you some type of kindred spirit to law enforcement or the police officers?

A Probably so that, I don't know that I realize that, but I would think it probably has.

[p. 1300] Q In light of that, would you be able to be fair and impartial as it may relate to any witnesses that the defendant might have as opposed to witnesses that the prosecution might have?

A I would hope that I could.

Q I can appreciate your candidness and honesty, but hope that you could is not going to be enough. We have, because of the seriousness of the case we are involved in, we must get a little more particular and specific with you.

A Well, I feel that I can.

Q That is fine.

A I'm trying to be as honest as I can with you. If I have any kind of prejudices in that direction towards one person or another as far as their testimony is concerned, I don't know it.

Q Well, sir, let me assure you at this point we appreciate that honesty and we are not trying to ask you to do something that you can't do. Our questions are – they are not right or wrong answers. Our questions are couched to get to know you in a very limited period of time. We are not trying to confuse you or do [p. 1301] anything of that nature or imply anything, but just as best you can and if you say you feel you can, that is the best answer we can ask for. So there are no good or bad answers, and we are not trying to determine whether you are right or wrong. We are trying to determine what your stance is on certain things. Now, you indicated that you or your spouse or someone else in your family has studied law. Who would that be?

A My father was a Judge and lawyer.

Q Where was this?

A In Houston County, Crockett.

Q Crockett, Texas?

A Yes.

Q Did he handle criminal cases?

A I was pretty young when my dad died, so I don't know that much about the work he did. He was a County Judge.

Q Okay, you mentioned that you had, you indicated that you had been interested in the outcome of a criminal case. Would you share with us what that case, that was or if it was related to your job?

A They were related to my job, and no particular [p. 1302] case, but everything I was also interested in the outcome of any investigation that I did.

Q Okay, let's talk about these special issues a little bit, and in light of that, sir, you realize, do you not, that as he sits here before you now, Gary Graham, is cloaked with the presumption of innocence?

A Yes, sir.

Q Would you be able to give him that presumption of innocence until rebutted by credible evidence and all testimony is in and then you have a chance to make up your mind whether he is guilty or innocent?

A Yes, I would.

Q And we are mandated by the Code of Criminal Procedure because this is one of the only instances or the only instance where a defendant cannot give up his right to a jury assessment of punishment. In other cases he can waive or give up that right and have the Court assess his

punishment. When you are charged with capital murder, and the only two punishments that can be meted out are life or death, a defendant does not have an opportunity to waive or give up that right. [p. 1303] So we are in a position where we have to discuss punishment with you prior to getting there on the guilt or innocence phase of the trial. Hopefully, sir, you won't think that because we are discussing punishment with you that we are looking ahead to punishment and assuming or looking ahead with the fact that he is going to be found guilty?

A I understand.

Q And you would not hold that against us, that we are discussing punishment with you at this time?

A No.

Q Okay, special issue number one, if we get to that point, sir, is a two prong question. One is whether the act was deliberate or done deliberately, and the other is whether there is a reasonable expectation that a death would occur. Can you, sir, in your mind, conceive of a set of circumstances and not calling on any fact situation that you necessarily have been given here today, but the legislature, in its intent was to allow for any range of circumstances which might occur, could you, sir, foresee in your mind [p. 1304] any set of circumstances where one might commit an act deliberately and not have a reasonable expectation that a death would occur?

A I'm not sure I understand that.

Q Let me see – okay – there is the two prong nature of the question, joined by that wonderful conjunction

and. So you have got to look at it from two separate points. Can you understand that?

A Yes.

Q Would you be able to separate the two, and analyze each part separately and answer that part separately before you answered your general answer to special issue number one?

A Yes.

Q And could you have an open mind during that phase of your deliberations, where you are separating and analyzing it?

A Yes.

Q Could you, sir, in your mind, conceive of a set of circumstances or facts, and I'm not asking you to give us something that you would find to be deliberate or without a reasonable expectation, but can you, in your [p. 1305] mind, see where sometimes you might find that one acted deliberately and had an expectation that somebody would die versus where one acted deliberately and did not have a reasonable expectation that someone would die?

A Yes, I can see the difference.

Q So you wouldn't think that automatically just because someone did something like shooting somebody, that they would automatically have an expectation that that person would die?

A Well, like an example if somebody was shot in the foot or something like this, I would see that maybe they

would not expect him to die. If that answers your question?

Q Okay, well, it answers my question with respect to that example. But for foregoing that example and going into your own mind and I'm not asking you to give me any example of your own, but I am asking you can you conceive of other situations, other than that example where you might not have an expectation that somebody would die?

A Possibly.

Q Okay, concerning special issue number two, what type of information would you like to have [p. 1306] brought to you, sir, before you could make that kind of answer of yes, that a person would commit criminal acts of violence that would constitute a continuing threat to society?

A Well, I would like to know more about the personal history and what he had done previously, whether it be good or bad or what, up until the time that the particular act happened. I would need to know more about him than just this one particular act.

Q Would the fact that a person had committed a criminal act of violence make you automatically vote yes to special issue number two?

A Single act?

Q Yes?

A No.

Q Special issue number three goes to provocation, and in a proper instance, not in one of these instances,

but in an instance of just murder, a person has available to them the defense of self defense or self protection of oneself. As you have been told today, a defendant in a capital murder case does not have that defense [p. 1307] available to him. He can't say that well, I shot him because I shot him because he was going to shoot me. I shot him because he made a move and I was afraid he was going to kill me. If found guilty, he was in the course of committing an offense, himself, which means that you can't be excused for doing something because somebody else did something to you if you are already there and you provoked it, yourself. However, if it is raised by the evidence, you would have to determine whether the conduct of that defendant, in doing what he did, namely killing somebody else, was reasonable or unreasonable in light of the provocation by the deceased person. Can you, sir, in your mind, conceive of facts or circumstances which caused the death of the deceased person based on his provocation and where the acts of the defendant would not be unreasonable? If I confuse you, tell me. I might have confused me. I was trying to follow a train of thought?

A Would you, if I understand it right, this doesn't have anything to do with whether the [p. 1308] person is guilty of the capital murder charge?

Q Nothing at all, sir. If we get to this phase, we are at the second stage of the trial, the punishment phase, and he has been found guilty.

A All right, then yes, I can understand how it could be.

Q Let me give you an example that might not necessarily go to an extreme. I'm in a store, my own store with my property, earning a living, like everybody who is a citizen of Harris County is asked to do, just work and maintain my business. Someone comes in to rob me. I make a judgment that I'm not going to give up the property I have worked hard for to this person. They don't have a right to it. Now, it is not for us to determine whether that judgment call I make is a dumb or stupid judgment call, but the fact that it is made, well, in attempting to protect my property, what is my own, I reach – now there is no showing that I got anything, that I got a gun under the counter or I got anything, but I reached, when I reached, the person who is standing there with a gun in [p. 1309] reaction to my reaching shoots. Now, we don't know where he hit, but we know as a result of my being shot I'm dead. That in no way lessens the fact that the person is guilty of capital murder, but can you, sir, in light of those circumstances, see what I did, and I am not asking you to determine whether it is reasonable or not at this point, but can you, by the facts that I have given you see what I might have done in making the reach, might have provoked the person into shooting?

MR. HOBBS: Your Honor, I would object as being improper question, calling for the witness to be bound by an answer or to answer to a specific given set of facts.

THE COURT: That is sustained. I think the witness has already answered the question prior to that, Mr. Mock, that he could keep an open mind on that issue.

Q (By Mr. Mock) You could keep an open mind on that issue?

A Yes.

Q And you wouldn't automatically vote yes just because I'm protecting my property and someone comes in with a gun and robs me and ends up [p. 1310] killing me?

A I don't now how to answer your question. Would you repeat it for me, please. Let me see if I can get it straight.

Q That you could keep an open mind, which you said you could do and that you would not –

THE COURT: Let me try, Mr. Mock. Remember the example I gave you, Mr. Bradley, about the store clerk shooting the defendant after he had been wounded and was on the floor, in light of that situation or any other situation we have given you, could you keep an open mind and only answer that special issue after all the evidence was completed?

A Yes.

THE COURT: That is sufficient.

[p. 1311] EXAMINATION BY DEFENSE CONTINUES

QUESTIONS BY MR. MOCK:

Q I would like to just ask you, sir, about your views on the death penalty. You indicated to the Court that you were not against the death penalty as assessment of punishment in a proper case?

A That is true.

Q When, sir, did you develop your views on the death penalty?

A Well, I – let me tell you I have had a hard time with that problem because it has come up, you know, over the years, and because of some of my religious beliefs I used to have a terrible problem with the death penalty, but I guess because of the close association with a pastor of mine about three or four years ago I realized that yes, under some circumstances a person does forfeit the right to live. That is when it happened.

Q You say that was as a result of a conversation with some minister you had, pastor you had, sir?

A Well, not just a conversation with him, but I [p. 1312] think he was part of the cause for me feeling like I do today, that yes it is possible under certain circumstances that a person should be given the death penalty.

Q You indicated that you have strong religious beliefs. Are you very active in your church?

A Well, fairly much.

Q Okay, but although you have those religious beliefs and it may be hard for you to do, could you, sir, if you found beyond a reasonable doubt that the answers to all these issues should be yes, could you vote yes?

A Yes.

Q But you would be fair and impartial, look up all of the facts, all of the circumstances presented before making that decision?

A Yes.

Q Is there anything that you can think of, any reason you can think of that you could not be a fair and impartial juror as relates to this case?

A Not that I know of.

MR. MOCK: Your Honor, we pass the witness.

[p. 1313] THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: The State accepts.

MR. MOCK: May we have a moment, Your Honor, to converse?

Your Honor, if it pleases the State, we will accept. If it pleases the Court, we will accept.

THE COURT: Both sides accept Mr. Bradley as a juror. Will you stand and raise your right hand and be sworn.

(At this time juror sworn.)

THE COURT: Mr. Bradley, this will conclude your jury service as far as today. As I told you, we anticipate that the evidence will begin to be presented on the 26th, which is a week from today. We anticipate that it will take approximately a week. We have phone numbers, both home and business for you. We will contact you at some point later this week to assure you that we will be starting on Monday. My courtroom is on the 4th floor in this building, and the case will be heard in my courtroom on the 4th floor of this courthouse. If there is any need for you [p. 1314] to contact us, Mr. Pollinger will give you

our phone number. With that, you are excused. If necessary, Ms. Hamilton will give you something to show you have been on jury service.

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* * *

[p. 1402] MS. BILLIE DIANE GASKILL, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q. Good morning, Ms. Gaskill. It has been about one day, I guess, since I made my remarks to you as a panel as a whole, and I noticed in looking at your juror information form that you have had prior civil jury service but not prior criminal jury service. There were many principles that I discussed with the jury panel yesterday with regard to the trial of a criminal case. Did you have any trouble understanding this?

A. No.

Q. Do you feel you can apply those principles?

A. Yes.

Q. As I told you yesterday, Ms. Gaskill, the offense with which we are working at this time is the offense of capital murder and that the defendant, Gary Graham, is accused of committing the offense of capital murder, and in being accused of that offense, there is a possibility that [p. 1408] [sic] Mr. Graham, should he be convicted of the offense of capital murder, will receive the death penalty as punishment. It is not a certainty. It is a possibility, and we have to plan for all contingencies. Obviously, there are many things that will come into play before that stage is reached. As you recall yesterday, I told you that the trial of a criminal case takes place in two phases. The first phase is the guilt-or-innocence phase, and the State must

prove to the twelve members of the jury beyond a reasonable doubt that he is guilty of a crime that he has committed before the punishment phase is reached. Do you understand that?

A. Yes.

Q. So at the punishment phase of a capital murder trial, the jury is faced with two possible punishment alternatives. Those alternatives are life in the penitentiary or death by lethal injection. So, obviously, it is a very serious situation. All right. My question deals with your feelings about the punishment alternatives in a capital murder case. As I told you yesterday, I asked each of you to spend some time on individual reflections with regard to [p. 1404] your feelings as to the death penalty with regard to punishment. Do you have an opinion one way or the other as to the death penalty?

A. I believe in it.

Q. Are you telling me you have no conscientious, religious, or moral scruples against the imposition of the death penalty if you think it is a proper case for it?

A. Right, I don't.

Q. And you can participate in a jury verdict that did return a death penalty as punishment, is that right?

A. Yes, sir.

Q. There are some principles that apply that I want to go over with regard to the functiong [sic] of the punishment phase of the criminal trial. As I told you, the State must prove to you beyond a reasonable doubt that the defendant is guilty of the crime. The State must

further prove to you, if they seek the death penalty and the State has informed the Court of its intention to seek the death penalty, that the State must prove to you on the punishment phase of the trial that the death penalty is the proper punishment. That the Defense has no burden whatsoever. If [p. 1405] the State does not prove to you beyond a reasonable doubt that the death penalty is the proper punishment, then you're obligated as a matter of law to return life imprisonment as the punishment in this case. Do you understand that?

A. Yes.

Q. We are seeking to find twelve people who even if they do convict someone of capital murder will not have some predisposition or are locked in as to what they feel the proper punishment should be. The reason for that is there are special issues that are presented to the jury on the punishment phase of the trial that will bring about presentation of testimony to the jury. There will be further evidence in the punishment phase that will in some way cause the jury to answer the issues one way or the other, and it is the way that the jury answers those issues that determine what the punishment is, but we are looking for twelve people who have an open mind. We do not want twelve people to say if you take somebody's life, you automatically get the death penalty, and, likewise, we don't want twelve people that say they could never [p. 1406] participate in a verdict in which the death penalty was returned. So we are looking for people to say if the case is a proper case for the death penalty, that they could take part in that verdict, but they are not automatically predisposed for voting for the death penalty

because someone's life has been taken. Do you feel you could have an open mind on those issues?

A. I think I could.

Q. Okay. You are familiar from your jury service in a civil case with the concept of special issues. That is how the case was presented to you in the civil case. In the punishment phase of a capital murder trial, there are at least two special issues submitted to the jury. Possibly three. And those two special issues are pinned to the bulletin board to your right. If you would take a moment to read those issues, and we will talk about them further.

A. Yes, sir.

Q. Do you have any difficulty understanding those first two, Ms. Gaskill?

A. No, sir.

Q. First of all, let me tell you something about these special issues. There will be no [p. 1407] definitions that I will give you as to any terms. It will be a matter of you using your common sense in deciding these issues. In Special Issue No. 1, we are asking you whether the conduct of the defendant was committed deliberately and with the reasonable expectation that the death of the deceased or another person would occur. Now, in deliberating or in considering the first special issue, I think it's obvious we are asking you to think back or reflect upon the testimony that you would have heard at the guilt phase of the trial with regard to the defendant taking the life of another person. We are asking you to think back on that testimony and answer two questions. Number one, did the defendant in embarking upon this conduct of the

death of the deceased, was it committed deliberately, and, number two, did he reasonably expect that the death of the deceased would occur. Those two questions, was it done deliberately, and did he reasonably expect that the death would occur? Obviously, there are many situations that might cause you to answer this issue in a different manner. You are faced, on the one hand, with a cold-blooded [p. 1408] killing versus, say, a person walks into a store with a pistol, takes money from a clerk, and guns him down in cold blood with no provocation, no, nothing being done by the person before he was killed. Obviously, in that situation, you very well might say yes, I believe he took the person's life deliberately, and yes, I believe he reasonably expected to take that person's life. On the contrary, you may be faced with a situation where a person goes into a store, and let's assume it is a young person that has an ill family at home and has no way to get any money, and out of frustration, he goes in the store with a pistol to get money but not intending to hurt anybody. He goes in the store with the pistol and takes money from the clerk, intending to take money from the clerk. He doesn't get that far because as he walks in the door, he slips on a jar of broken baby food on the floor by the door and his feet fly out from under him, and the gun hits the deck and automatically discharges and hits the clerk and he is killed. In that situation, he is guilty of capital murder because he committed aggravated robbery, and the clerk is killed. But in viewing [p. 1409] that situation, you might say, "I don't think he expected to kill the clerk. He intended to rob the clerk, but he didn't intend to take another person's life, so it is no." You may have another situation where the robber starts out the

door and the clerk starts to chase him and shoots him in the foot. He doesn't intend to harm him. He only intended to shoot him in the foot, but he doesn't mean to harm him. When the clerk gets hit in the foot, he falls and hits his head on the counter and he dies. In that situation, you might say he deliberately intended to shoot him, but he didn't reasonably expect him to die. You might consider those situations with yes against a no answer to anyone on the jury. All yeses mean death by lethal injection. A yes answer requires a unanimous verdict. All twelve must agree. A no answer requires a verdict of at least ten. A vote of ten or more is enough to give a no answer which means life in the penitentiary. Do you have any problems with that first issue we are talking about?

A. No, sir.

Q. Let's go to the second issue. It is asking you [p. 1410] to predict the future. We are asking you is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society. Once again, no definitions will be given to the jury by the Court. We are asking you, number one, is it more likely than not? Is it probable that the defendant will commit criminal acts of violence. Criminal acts of violence mean many, many different things. It can be from a Class B assault where someone touches you on top of your head and you find that act offensive. That is a Class C assault to the other extreme of capital murder with the full gambit in between of assaults, robberies, kidnappings, murders, and even including the crime of violence against property. If someone were to run a Volkswagen across your front porch and knock out one of the pillars, that is a crime of violence against property

and would fall within that group. The last question is would the person probably commit these criminal acts of violence to the extent that he would constitute an ongoing or continuing threat to society. Not only society as you and [p. 1411] I know it walking the streets in Houston, Texas, but would he also possibly constitute a continuing threat to other persons that he might be around in the penitentiary, guards and other inmates. So, you know these are terms that are to be defined by your own conscience. Once again, the State has the burden of proving to you the answers to these issues should be yes. If they don't carry that burden of proof, the answer should be no. The defendant should get life instead of death in that situation. Do you understand that, Ms. Gaskill?

A. Yes.

Q. Any questions to this point?

A. No, sir.

Q. These two special issues will always be presented on the punishment phase of a capital murder case. They will always be here. There is a possibility that a third special issue may be presented, and that is a special issue dealing with a comparison of conduct resulting in the death of the deceased, a comparison of the conduct between the defendant and the person who is killed. We are asking you, number one, if raised by the evidence. It does not require [p. 1412] that ten witnesses testify to the same thing. All that is required is testimony by the one witness to one line of testimony. If it is raised by the evidence, you have to present this special issue in the charge. What is raised by the evidence. Did the conduct

of the defendant in killing the deceased take place in response to provocation by the deceased, if any? The extent that the defendant acted unreasonably or did not act unreasonably in taking the life of that person. So, we are asking you to compare the actions that the defendant took in taking the life of the deceased in comparison to whatever actions the deceased took before he was killed. This automatically cuts against my grain and possibly your grain in that we are more or less asked to evaluate the actions of a person whose life has been taken possibly in defending his property, but that is not what we are trying to do. We are not saying that a defendant in a capital murder case has a right to self-defense. He does not. By walking in that store and provoking the difficulty, he forfeits the right of self-defense, and if the clerk would pull the [p. 1413] gun and fire at him and he fires back and shoots and kills the clerk, he can't say, "I shot in self-defense because the clerk fired first." That is not at all what the situation is nor are we trying to infer any criminal responsibility for this happening to the deceased. What we are saying and what the legislature, I think, intended to say is that we are asking you to review this conduct to give you one other item of deliberation for you to determine whether or not this defendant deserves the death penalty or deserves life in the penitentiary. This in some ways mitigates in the situation or in the direction that the defendant should receive life and not death. Now, let me give you a couple of examples I think may possibly clear this up.

The issue was was [sic] the defendant unreasonable in taking the life of the deceased based on provocation, if any, that the deceased did before he was killed. Do you understand what that issue is?

A. Yes.

Q. Assume we are back to our first hypothetical situation where the person has walked into the [p. 1414] store to take money because he just has to have the money for his family, but not intending to hurt anybody. He has an old pistol that has one bullet in it, and he walks in the store and takes the money from the clerk, and just as scared as the clerk is, he takes the money from the clerk and puts the pistol back in his belt and turns to walk out of the store. He is one foot from the door. He reaches out for the door. The clerk pulls a pistl [sic] out from under the counter. He shoots and fires and hits the defendant in the shoulder or the leg and he falls. The clerk comes running at the defendant with the pistol in his hand and the defendant sees the arm is going back, and he will be killed. So, he pulls the pistol from his belt and fires and shoots the clerk and kills him. That person is guilty of capital murder. He is going to get the death penalty or life in that situation. Okay. There is no way around that. The question then becomes were his actions unreasonable in light of what the clerk did? Did the clerk in some way contribute to or provoke the situation? You have got a situation where if the clerk had stood [p. 1415] there, the man would have walked out of the store and nothing would have happened to him. The clerk pulled the pistol and more or less assisted in the provocation by pursuing the man when the man was almost out the door and the man had done nothing to him. Once again, we are not defending what the defendant has done, but we are asking you to compare these courses of conduct to decide if the deceased, number one, provoked the situation, and, number two, in provoking the situation, was

the taking of his life unreasonable based on what he did or was it reasonable? You may find it's unreasonable or you may find that it is not unreasonable, but it is reasonable. Here, once again, what we are looking for are people who will reflect upon the testimony that is presented to answer this issue one way or the other based on the evidence that is presented. Once again, we are not in any way trying to apologize for or defend what the defendant has done in taking the clerk's life. It will be our saying and what the legislature is saying is this is an additional area for the jury to deliberate upon in determining whether a person should live or [p. 1416] die. Do you understand what I'm driving at in this issue?

A. Yes.

Q. Do you feel you would have an open mind to all these issues if you were a juror in this case?

A. Yes, sir.

Q. This concludes what I want to talk to you about. As I told you, both lawyers get a chance to talk to you. Mr. Hobbs, an Assistant District Attorney, will be for the State, and Mr. Thornton will be for the Defense.

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q. Good morning, Ms. Gaskill.

Which store did your husband manage while he was working as a manger for a grocery store?

A. It was a Gerland's chain.

Q. Gerland's?

A. Yes.

Q. While he was the manager of that Gerland's supermarket, was it robbed in any manner?

A. As long – they were robbed, yes. As long as [p. 1417] we have been married, he has never been at the store while it happened or anything like that.

Q. Now, the judge has told you as a member of the entire panel on Monday that the State's burden of proof is beyond a reasonable doubt, not beyond all doubt or beyond a shadow of a doubt. If it were beyond all doubt, I think you would have had to have been present and actually saw what happened to remove all doubt from your mind. So, it's an impossible burden because if in that instance, you couldn't be a juror. You would be a witness. Do you have any problems with that?

A. No, sir.

THE COURT: Let me ask one question, Mr. Hobbs. Because of your husband's association with Gerland's and the fact that Gerland's has been robbed, maybe not while your husband was there one way or the other, would it cause you to be – would it cause you to unfair or partial to one side or the other because of the fact that that took place?

A. That is a little tough to answer because while it never happened while he was there, there was always the possibility that it could, and I [p. 1418] would think how would I feel if somebody walked in and robbed him and he died from it.

THE COURT: Obviously, that is certainly a valid concern on your part. Once again, it is obvious that this defendant, Gary Graham, was not involved in that robbery.

A. Right.

THE COURT: We are talking about a different situation. We also talked about the fact that the State must prove to you beyond a reasonable doubt that the defendant is guilty and that you must afford this defendant the presumption of innocence until or unless and until the State carries that burden of proof. Do you think that you could hold the State to the burden of proof that the law demands?

A. I think I could.

THE COURT: Do you feel that because of the instance that you would lessen the burden or you would be more prone to vote yes because of the background that your husband has had?

A. Now, that I don't know, really know.

THE COURT: Do you think that might be a possibility?

[p. 1419] A. It's hard to say. Like I said, if something had really happened and he would be hurt, I could see where I could be biased, and he is no longer in the grocery business. I don't have that worry anymore.

THE COURT: And there would be nothing in your past that would cause you to not be fair and impartial?

A. I don't think so.

THE COURT: You are saying then that you feel you could be fair and impartial to both sides?

A. Yes.

THE COURT: You could follow the law as I gave it to you in the charge?

A. Yes.

THE COURT: Mr. Hobbs, you can continue.

EXAMINATION BY THE STATE, CONTINUED

QUESTIONS BY MR. HOBBS:

Q. Your husband is presently working for A & W?

A. No, sir. It's a delivery service.

Q. Okay. There are two parts of the trial. [p. 1420] Guilt-or-innocence. The defendant is found guilty. Then, there is the punishment phase of the trial.

You understand our law when a person reaches the age of seventeen, that person is considered an adult under the law of the State of Texas? Would the fact the youth of an individual still considered an adult under the laws of the State of Texas – would that cause you to render a verdict one way or the other simply because of that person's age?

A. No, sir.

Q. You could look at that person, whether he was young, old, or middle-aged, as an equal individual under the eyes of the law?

A. If they are seventeen, yes, sir.

Q. Okay. Now, I want to ask a question. My next question, and those questions concerning questions 1, 2, and 3. I'm going to give you a hypothetical situation in which I will ask questions of you later on.

This is the hypothetical situation that I would like to deal with. Let us assume that this store – I mean that this courtroom is a Seven-Eleven store, and let us assume that [p. 1421] there are some people in the store. Among the people in the store is you and where you are sitting right there, you have a little bit of a problem seeing Mr. Pollinger over off on the other side, the bailiff. Let us presume that there is something in the store that puts you in that same position, that you can't see. Let us further presume that he is at the cash register there. It's near the end of the shift and that he has taken the money out of the register and placed it into a commercial drop bag and is restocking the shelves, and he is holding a box, and that bag is partially sticking out of his pocket. Furthermore, besides yourself and Mr. Pollinger, Mr. Thornton is there; he's present in the store in an area about where he is here. Let's furthermore presume that Ms. Slessinger, the court reporter, is sitting in the jury box area, say, something like this with an obstruction in the store, something blocking her view about waist high, about like this rail is. The four of you are present in the store. I'm going to be the perpetrator of the crime. I come in and I see Mr. Pollinger behind the register, behind the [p. 1422] counter with the box stocking items on the shelf. I can see the money bag in there, and I know what it is, and I go and I start to grab the bag, and when I – just about the time I get it, Mr. Pollinger sees me and still holding the

box, he moves away from me. When he does that, I grab him with one hand and I take – come up with a pistol from the other. Well, Ms. Slessinger hasn't paid much attention to what I look like other than general clothes, but when she sees that gun, she sees the gun and she doesn't see anything else but the gun, and she hits the floor. Let us further presume that you hear a commotion, but like you are now, you can't see what is happening. Further, that Mr. Thornton sees me also, and he looks at me. He hollers and when he hollers at me, I turn to him and I look at him, and when I turn and look at him, Mr. Pollinger breaks away from me. When he does, I turn from Mr. Thornton and immediately back to Mr. Pollinger, shoot and hit him in the chest killing him and I run off. Now, you understand under the laws of the State of Texas, I have committed the offense of capital murder, murder during the course of [p. 1423] committing a robbery. Now, you understand that robbery doesn't have to – you don't have to get any property to have a robbery. If I came up to you and demanded your money, held a gun on you, and a police officer came up behind me and stuck a pistol to the back of my head and said, "Drop it," I have committed the offense of aggravated robbery. Any problem with that?

A. No.

Q. Now, in our example, let us say that I get caught later on and let's make it tough. I don't – they don't get the gun I use to shoot and kill Mr. Pollinger with. I didn't leave any fingerprints because I didn't touch anything there or if I did, there is nothing there, and I didn't get any property or if I did, they didn't find any on me. So, let us further presume that the State has put on its case,

and they have proved up that it occurred in Harris County and that it was on a specific date and during the course of committing a robbery, and that Mr. Pollinger's death was the result of being shot with a gun. Let us further presume that there is only one thing that is necessary and I am being tried for capital murder. They [p. 1424] have got to prove it to me.

So Mr. Thornton takes the stand and testifies that, "Yes, I saw Carl Hobbs shoot and kill Mr. Pollinger on that day. A single eyewitness. Could you, if you believed beyond a reasonable doubt that person base a conviction for the offense of capital murder on the testimony of a single eyewitness?

A. If I believed the person testifying, yes.

Q. Okay. Would you require that proof as to that issue to be greater than as to the other issues if you believed it beyond a reasonable doubt?

A. Yes, sir.

Q. You would require a greater amount of proof beyond a reasonable doubt?

A. Yes, sir.

Q. In all instances?

MR. THORNTON: Your Honor, I would object to that. The witness has already answered the question.

THE COURT: Would you repeat the question, Madam Court Reporter, that was voiced?

(At this time, the question was read back by the court reporter.)

[p. 1425] THE COURT: Let me ask a few questions of you, Ms. Gaskill. Obviously, Mr. Hobbs has asked you about the fact if there is only one eyewitness by the State, could you convict on the testimony of that one eyewitness alone if you believed that one witness beyond a reasonable doubt. You may not believe that witness beyond a reasonable doubt, but assume for argumentative purposes that you do believe that person beyond a reasonable doubt. Could you convict on the testimony of that one witness alone?

A. Yes, sir.

THE COURT: Okay. The objection is sustained. Move on to something else.

Q. Thank you.

As to Special Issue No. 1 whether or not the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another person would occur. Of necessity, we are going to have to look at the facts of the case that we have just got out of the guilty stage with.

A. Right.

Q. You are going to have to look in the example of [p. 1426] what I did to decide whether or not it was deliberate. It's not going to be a definition of what deliberately is. Webster defines it as being a willful or voluntary act. It doesn't mean premeditation. I can deliberately walk over to this fountain and get this cup. That is a deliberate act, without much thought.

Do you have a problem with that?

A. No.

Q. Now, a reasonable expectation. What I did, was there a reasonable expectation that the death of Mr. Pollinger in the example would result? I shot him in the chest. I might find that's a reasonable expectation. You may or may not. Had I shot him in the foot as in the judge's example there, there might be a different expectation that you would look at. It depends on the circumstances.

Could you answer that question based upon your view of the testimony and considerations of Special Issue No. 1?

A. Could I answer the question?

Q. I'm not asking you to do it. I'm asking you, could you look in this phase of the trial? We are in the punishment phase, and in the example, [p. 1427] I had been found guilty of capital murder. Now, what you have to look at is what did I do. Was it a deliberate act and was that act and my actions in causing the death of the deceased, was there a reasonable expectation on my part that that death would result from my actions by looking at the evidence. Once again, the State has the burden of proving to you as a juror that that answer should be answered yes beyond a reasonable doubt.

Do you think that you would be able to look at those facts and answer that question, define for yourself deliberately and reasonble expectation?

A. Yes, sir.

Q. Now, as to Special Issue No. 2, whether there is a probability that the defendant will commit criminal acts

of violence that will constitute a continuing threat to society. If you remember what the judge talked to you about, society includes prisoners and so forth. Probability is not defined. It doesn't mean absolutely, one hundred percent that it is something that is going to occur. The words likely or possible come to my mind. Do other terms or definitions [p. 1428] come to your mind in thinking about probability?

A. No.

Q. Now, probability. What are the chances that the defendant in that example, that I will commit criminal acts of violence in the future? Criminal acts of violence. Can I define those for you. It can be something very minor. I can rip off the blinds from the window, break her machine, or go out and shoot Mr. Thornton, or commit an aggravated robbery. A murder. A capital murder. This phase of the trial, needless to say, the actions in the first part of the trial, what I did in this specific instance may give you some insight in how I might or may not react in the future. Okay. As to this special issue, the judge can allow the jury to hear testimony if he deems it relevant and material to the prior criminal record of the defendant, if he has one, to other criminal acts of violence, if there are any, to reputation testimony, whether it be good or bad as to that individual that would help you in answering along with the facts of this question of probability. And whether or not that would be a continuing threat to those [p. 1429] people. Even to those people that might be in prison.

Do you have a problem with that?

A. No.

Q. Now, Special Issue No. 3 is somewhat a little bit more difficult, but really not so. When we look at Special Issue No. 3, first of all, if it's raised by the evidence. Even if it is raised, even if it's very small, under the law, the judge has to put it there. The law says he has to put it there. He is not commenting that he believes it's there or not. He has to put it there, and you have to answer it as a potential juror. Here, let's break it down. Provocation first, if any. You have to decide in looking at the facts of the case whether or not what in this instance in the example whether the deceased, Mr. Pollinger, what did he do. Did he do anything, first of all. Then, what he did, was that provocation, and provocation won't be defined. You have to decide in your mind was pulling away from me provocation? Okay. Then, you have to look at whether or not that action was reasonable or unreasonable, my actions in shooting him because of what he did. Was it [p. 1430] reasonable or unreasonable? You may find that it was not unreasonable or that it was depending on the facts. Let's go to the example – maybe to an extreme where the judge gave you about the guy that goes out of the store, is almost out, and hasn't shot. He was shot in the back and in the leg, and the clerk is running up with a gun. Well, there you might say that what actions, what did the clerk do? Well, he grabbed the gun and shot the guy twice, shot me twice, and he was coming up to me like he was going to shoot me again. I shot and killed him. I'm still guilty of capital murder, but was there provocation on the part of the individual that got killed, and what in relation to that action was the actions that I took reasonable or unreasonable in relation to that action.

Do you have a problem with that?

A. No.

Q. Now, if you believed beyond a reasonable doubt that those answers to Special Issues 1, 2, and 3 should be answered yes, if all three were submitted, knowing that those answers, and it was a unanimous verdict of the jury, that that [p. 1431] would result in the death penalty being imposed, could you vote yes?

A. Yes, sir.

Q. Okay. Ms. Gaskill, is there any problem with anything we have discussed thus far that – or something that I confused you with that you would like clarification on?

A. No, sir.

Q. Is there any reason why you feel you couldn't be fair both to the defendant and to the State?

A. Why I could or couldn't be?

Q. Is there any reason you could not be fair that you know of that we don't know of?

A. No, sir.

Q. Okay. Thank you.

THE COURT: Mr. Thornton, you may proceed.

EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. THORNTON:

Q. Good morning, Ms. Gaskill. My name is Chester Thornton. I am a defense attorney, one of the co-counsel

representing the defendant in this case, Gary Graham. I have a few questions I [p. 1432] want to ask you, and I want you to be as open and candid as possible. I'm not here to try to embarrass you or persuade you on your beliefs or anything. That is not my point. My point is to try to find out how you fee, how does Billie Diane Gaskill feel about certain issues. Okay?

A. Okay.

Q. I notice that you have not been a victim of a crime and neither been a witness in a criminal case before. Right?

A. Right.

Q. And you have never served on a criminal jury before?

A. No.

Q. Can I ask you, what was your first reaction when you found out you had been called as a juror on a criminal case?

A. I didn't have any reaction. You just come down. This is the second time this year.

Q. You realize your civic responsibility and come down?

A. I don't have a choice.

Q. What was your response, say, when you found out you might be potentially sitting on a capital [p. 1433] murder case?

A. Well, you don't really have a response until you start going through all of this because you don't know; at least I didn't.

Q. Was the mere fact it was a capital murder case, did that light up any light in your head or make you think differently on your responsibility?

A. No, sir.

Q. Okay. I want to get into now on your beliefs concerning capital punishment, and I want you to look at it from the perspective on how you formed your beliefs and the basis of your beliefs, and the reason I'm saying that, how you came to believe the way you did and why you believe the way you do, and I want you to view it in the respect of being candid and honest with you. How you feel about it is not going to make me, cause me to look down on you in any way or cause me to look up to you in any way. I want to know how you feel and in that vein, could you tell me, Ms. Gaskill, how do you feel about the death penalty in relationship to society?

A. I feel like it is needed.

Q. Okay. In what way? In your own words, how is it needed?

[p. 1434] A. If someone that was close to me were killed, I would like to know that they were not – they did not just get away with the crime. I would like to know they were punished for it.

Q. Does the individual have to be close to you, the person that was killed?

A. I can relate to it more if they are close to me.

Q. Okay. Would it change how you would maybe deliberate on a person as far as if he is innocent or guilty if he is not close to you, taking it out of the personal realm, the person that died, he is not close to you, right?

A. Right.

Q. You don't know the deceased, do you?

A. No.

Q. So, this is an impartial situation?

A. Right.

Q. You, from that impartial situation, how would you view the death penalty in that respect?

A. I believe it's there for a reason.

Q. What reason do you think?

A. To punish people.

Q. Okay. Do you think that it in any way deters crime or maybe keeps somebody else from committing [p. 1435] similar conduct?

A. I think it could, yes, sir.

Q. How do you think you might have formed those beliefs? How do you think you might have arrived at your beliefs?

A. I really don't know. It's just the way I feel. I couldn't know why I feel it or anything else other than I believe there should be a form of punishment.

Q. Now, we are not talking about a form of punishment. We are talking about the death penalty in this case.

A. Right.

Q. We are not talking about anybody else. We're talking about Gary Graham. Okay, and the effect potentially, the effect of your decision on this individual here. That is what we are talking about. Do you feel that just because a person faces a mandatory punishment of either life or death, do you feel that that might affect you on how you'd deliberate on any of the issues, the facts that might be presented before you if you were selected as a juror? Do you understand me?

A. No, sir.

[p. 1436] Q. Okay. Does the mere fact that a person faces life or death, would that in any way affect on how you would look at the evidence that is presented before you answer?

A. Well, of course it would.

Q. How would it and in what way would it affect you?

A. Well, you would know that you have somebody's life in your hands, and depending upon whatever evidence you are presented, what my judgment from that is his life will be in my hands.

Q. Are you saying that you would have to be absolutely sure about the evidence before you could, say, make a decision?

A. As to somebody else's life, yes.

Q. I don't want to put – I say absolutely, I don't want to put it in my words. What would your words be?

A. I would like to be absolutely sure, yes.

Q. Okay. Do you think that you would be able to keep an open mind about it, keep an open mind about the whole, entire ramification of the whole decision that you would have to make from the point of what evidence is being presented to you as far as what you.would want to know [p. 1437] about the individual? Could you keep an open mind about that?

A. Yes, sir.

Q. And in reaching a decision on whether a person should live or die or whether a person should be removed from society or not, what would you like to know about that individual? What – how would you – what would you need to help you make a decision like that?

A. Well, it's hard to say.

Q. Okay. Well, we have to say because I want to know how you feel because, as the judge explained, we don't want a jury that is just – because of the nature of the crime, the seriousness of the crime, that they would automatically vote one way or the other, and that is why I want to find out your feelings.

A. How can you find out anything until you hear the evidence?

Q. What type of evidence do you want to hear? What type of things would you want to hear? If you don't know, okay.

A. I really don't know. If the evidence is presented and it proves that he did it, you know, what else can you do?

[p. 1438] Q. Well, that is what I am saying. We are not just talking – we are taking it out of guilt-or-innocence. Do you understand that I'm talking about punishment and what would happen to the individual if he is found guilty. Do you understand that I am not – assuming that he is already guilty and that I had to ask you your feelings concerning the death penalty because of the possibility this might happen. Okay?

A. Okay.

Q. Are you telling me that just because a person has been found beyond a reasonable doubt to be guilty of the offense of capital murder that he should receive the death penalty? Is that what you are telling me?

A. If it's like he deliberately did it and everything else, yes, sir.

Q. Okay. When you say deliberately did it, what do you mean?

A. Okay. Like just to say he walked in and killed somebody.

Q. Okay.

A. Yes.

Q. Yes what?

A. Yes, I would say he is guilty if there is a [p. 1439] witness to that, but if he was provoked, then yes, I could have a reasonable doubt.

Q. Okay. Let's say it has been found – it's beyond a reasonable doubt. It has been proved beyond a reasonable doubt to you. Okay?

A. Okay.

Q. That he did commit the offense of capital murder.

A. Okay.

Q. You found that beyond a reasonable doubt in your mind. You were satisfied in your mind. Okay. I am asking you in consideration of punishment, punishment, okay?

A. Okay.

Q. What would be your feelings then?

A. It would be the same thing. Okay, he is found guilty, but why did he do it?

Q. Okay. Would you have to know why he did it or would you want to know why he did it?

A. If he did it in cold-blooded murder, yes, I could say he was guilty, but if after he is found guilty, if for some reason he was provoked into what he did, I wouldn't think that he should get the death penalty then.

Q. You are saying if he was provoked in what he did?

[p. 1440] A. Right.

Q. I'm trying to see in my mind – we are already past whether he did it or not. You have already been satisfied in your mind, assuming that the facts showed

that he did indeed do it, we are trying to find out what should happen to this individual. Should this individual live or die, and I am asking you because of the fact that the defendant has been found to be guilty and you are satisfied in your mind beyond a reasonable doubt that he did commit the offense. All right? And when it comes down to what should happen to the individual, that is what I am asking you, as far as your views on it. Are you saying because you found him guilty that he should automatically receive the death sentence?

MR. HOBBS: Your Honor, I object as being an improper question.

THE COURT: Let me talk with Ms. Gaskill. I understand, ma'am. I can see how you are confused. We talk about the fact you have to have an open mind on all these special issues, not only to the deliberately and reasonable expectation but also as to the defendant's probability of committing criminal [p. 1441] acts in the future, and also whether or not there was provocation by the deceased before the deceased's life was taken by the defendant. Could you keep an open mind on all of these issues? Could you do that?

A. Yes, sir.

THE COURT: You would not be predisposed to give the death penalty just because you found somebody guilty of capital murder?

A. No.

THE COURT: Ask your next question.

EXAMINATION BY THE DEFENSE, CONTINUED

QUESTIONS BY MR. THORNTON:

Q. I wasn't trying to get you confused or anything. I have to be sure about your answers on that particular issue. Do you understand that? Just like the judge. When somebody says just because you did, we are going to do this. That is what I have to find out. You clarified that in my mind as far as you being open-minded about it. Okay.

Now, going down to Issue No. 3, and you mentioned the word provocation. Do you [p. 1442] understand that fully, that issue, fully? Do you understand that?

A. I think I do.

Q. Do you have any problems with anything you might want me to clear up or ask me about it?

A. No, sir.

Q. Okay. Is there anything that I might have asked you that might have confused you or you might have questions about?

A. No, sir.

Q. Okay. We have no further questions.

THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: The State will accept.

THE COURT: What says the Defense?

MR. THORNTON: May we have a second?

THE COURT: Yes, sir.

MR. THORNTON: The Defense will accept, Your Honor.

THE COURT: Will you stand, Ms. Gaskill and be sworn as a juror?

(At this time, juror sworn.)

THE COURT: Ms. Gaskill, this will conclude the necessity of your presence here today. We anticipate that the rest of the jury [p. 1443] selection will take probably the balance of the week. We anticipate starting the actual testimony in the week next Monday, which will be the 26th. We have your home and business numbers that you can be reached. Mr. Pollinger, the bailiff, will be contacting you before the end of the week to let you know that we will be starting on the 26th.

A. What if I had a vacation scheduled for that week?

THE COURT: Can it be rescheduled up until a later time?

A. I should be able to change it.

THE COURT: Anyway, we will be contacting you at the end of this week to let you know we will be starting on the 26th. Anyway, there is no need for you to go back to the jury assembly room. You are free to go back to work at Shell. Ms. Hamilton, the clerk, will provide written verification for the people at Shell to let them know you have been here on jury service the last two days, and you will begin your jury service as a juror in this case on the 26th. We anticipate it will take a week to try the case. Thank you very much. You are excused.

[p. 1625] MR. REED D. ARNEY, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q. You know Mr. Braddock?

A. No.

Q. I noticed you are a teacher, and he is the director of security.

A. I didn't realize that.

Q. I have gone out to Cy-Fair on occasion. I have a friend, Bruce Robertson, who handles the seniors – it's kind of a variety show that they put on on a yearly basis, and I judge which act is better and all that. It's a good school, and they seem to be nice kids.

Mr. Arney, I noticed in looking at your juror information form that you have been a regular around the courthouse complex as a juror. I take it from your background that you have no problem with the concepts I spoke about yesterday?

A. No, sir.

Q. Okay. What subject do you teach out at Cy-Fair?

A. History and English.

[p. 1626] Q. Would it be an insurmountable burden for your students if they needed a substitute teacher for a week if you were to serve as a juror?

A. No, sir.

Q. I'll bypass any discussion of the principles yesterday because I am sure they are familiar to you. Did you happen to know Andy Tobias with the District Attorney's Office?

A. No.

Q. Andy is a prosecutor from Marlin. My wife is from Waco, which is right around the corner.

Anyway, as I told you yesterday, the defendant, Mr. Graham, is charged with the offense of capital murder, and by virtue of the fact that he is charged with capital murder, he runs the risk, if he is convicted of the offense of capital murder, of being sentenced to the death penalty by the jury who serves in this case.

That is why we have to take the time and consideration of each juror to make sure that they could be a fair and impartial juror to both sides. You are familiar with the two-stage trial system we have in criminal cases?

A. Yes.

[p. 1627] Q. In the first stage in a capital murder case is merely to determine whether or not – I don't want to say merely, but it only to determine if the defendant is guilty of the offense of capital murder.

We then move to the punishment phase of the trial, and the reason that I make this point is because we must ensure that we have twelve people who will have open minds as to what punishment should be rendered if they find the defendant guilty. That is assuming that he is found guilty. That it may be an improper assumption. The jury may not find him guilty, and the punishment phase will not be reached. However, in the interest of preparing

for all contingencies, we would have to be considering after the defendant after the defendant had been found guilty and we move to the punishment phase.

Once again, I make this assumption that we must ensure that we have twelve people with open minds and we have twelve people who will not say, "Well, I have found him guilty of capital murder, and I have found him guilty of taking another person's life, so I'm automatically going to give him the death penalty [p. 1628] an eye for an eye and a tooth for a tooth sort of thing." That is not to say that we disagree with those people, but we merely cannot have those people on the jury in a capital murder case because there is more testimony that can be heard on the punishment phase of the trial that can influence the jury one way or the other as to what punishment or verdict they reach.

Likewise, we need to have twelve people who can, if they consider it to be a proper case, vote for the death penalty if they are convinced beyond a reasonable doubt that it's the proper punishment and that they reach this decision after all of the testimony is presented on the punishment phase of the trial. Do you feel, sir, that you have any conscientious, religious, or moral scruples against the imposition of the death penalty as a punishment in a case that you thought it would be proper?

A. No.

Q. I take it, then, Mr. Arney, what you are saying is if you felt it was a proper case, you could vote for the death penalty, is that right, sir?

A. Yes, of my own conscience beyond a reasonable doubt.

[p. 1629] Q. Obviously, as I said, it is a conscientious belief that we all have one way or the other. There are principles that apply in the punishment phase of the capital murder trial that parallel the guilt-or-innocence phase. One principle is the burden of proof that the State must bear.

In the guilt phase, as I am sure you are aware, the State must prove to you beyond a reasonable doubt that the defendant is guilty.

On the punishment phase, the State must prove to you beyond a reasonable doubt that the death penalty that the State is seeking is the proper punishment. In other words, you are thinking as you go into the punishment phase should be more in line with life in the penitentiary until the State proves to you beyond a reasonable doubt that the punishment should be the death penalty and not life in the penitentiary. The jury, in determining what the proper punishment should be, does this function by the manner in which they answer special issues that are submitted to the jury by the Court. I do not take a blank piece of paper and slide it under the door and say write life orn [sic] death. As I am sure from looking at [p. 1630] the civil case you served on involving, I assume it was a personal injury case, from your notation that the jury in this case reached its verdict by the way they answered special issues.

And the same is true on the punishment phase of a capital murder trial. This is the only type of criminal trial other than possibly a mental competency hearing that

special issues are submitted to the jury. The jury answers those special issues either yes or no. If the jury answers all the special issues yes, the defendant receives the death penalty. If the jury answers one or more or all of the special issues no, the defendant receives life in the Texas Department of Corrections. A yes answer by the jury requires a unanimous verdict just as it did on the guilt phase of the trial. A no answer, in paralleling the civil case you served on, requires a vote of ten or more. It does not require a unanimous verdict for a no answer to be determined. There will be no definitions in the Court's charge to aid you in your interpretation of the special issues that were submitted. They are matters that will involve using your common sense and your common [p. 1631] definitions. I will talk with you a little bit about what I think these terms mean, and the lawyers will talk to you about what they think the terms mean, but we defer to your individual interpretation.

There are a minimum of two special issues that are submitted on the punishment phase and a maximum of three. As I said, the answers that are given to these as to the defendant – I would like for you, if you would, to turn to the right and review the two special issues that are pinned to the bulletin board.

A. Okay.

Q. Those are the issues that are always presented on the punishment phase of the trial.

Special Issue No. 1, obviously, is calling you to reflect upon the testimony that you heard in the guilt phase with regard to the defendant taking the life of the deceased. It's testimony you will hear on the guilt phase because

you will render a decision, should you serve as a juror, as to whether or not the defendant did take the life of the deceased. So we are asking you, in reviewing that course of conduct that resulted in the death of the [p. 1632] deceased two questions.

Number one, did the defendant enter into that course of conduct deliberately, and, number two, did he reasonably expect or should he have reasonably expected that he was going to take the life of the deceased or the life of another person. Deliberately, once again, will not be defined. In my limited vocabulary, I interpret deliberately to mean a person's conscious objective, his intent to do something. It is a voluntary act on his part. It is not an accidental action. It does not accidentally equate with premeditated. In my interpretation, it does not have to be a showing of premeditation for this. For deliberately to be the situation, if it's a person's conscious objective to do something and he does it. You may have a different interpretation on that. Reasonable expectation, likewise, will not be defined, but we are viewing whether or not the defendant reasonably expected to take the life of the deceased when he entered into this conduct or should he have reasonably expected to do so? I think there are possibly varying fact situation that I might give you that might cause you to see [p. 1633] that there are many situations that may cause different answers by you as to this special issue.

Assume two hypothetical situations or three. Assume, number one, we are talking about a person who goes into a Stop 'N Go with an old pistol and one bullet in the pistol, and he goes in that Stop 'N Go to take money because he has a sick family at home and his wife

and family are ill and he has lost his job and he is at the end of his rope. There is no other way he can think of to get money. He goes in the store with this pistol with one bullet to take money from the clerk but not to do anyone harm in the store. He is not intending to hurt anybody, but he goes in the store with the pistol drawn, and he slips on a wet portion of the floor right inside the door, and his feet fly from beneath him. He hits the floor and the pistol flies from his hand and the pistol hits the floor of the store and accidentally discharges, and, as fate would have it, the bullet strikes the clerk behind the counter and the clerk is killed.

In reviewing that situation, you might [p. 1634] say the person deliberately entered the course of conduct in which the robbery took place or was taking place; however, he did not, based on his frame of mind and what happened in the store, reasonably expected that he was going to take the life of that clerk. You very well might answer that special issue no, he did not reasonably expect to take the life of the clerk.

However, you might be faced with another situation where the person walks in the store, takes the money from the clerk, and then with a smirk on his face, guns down the clerk in cold blood as he stands defenseless behind the counter. In that situation, you might very well answer yes, I believe that he entered into the course of conduct deliberately and yes, I believe he reasonably expected to take the life of the deceased.

The third situation might be one where the person takes money from the clerk and turns to run from the store, and the clerk starts to chase him. He fires at the

floor and hits the clerk in the foot, and the clerk falls and hits his head on the counter and he dies from the wound, hitting his head on the counter. In that [p. 1635] situation, you very well might say he intended to rob the store. It is a deliberate act on his part to shoot the clerk in the foot, but he could not have reasonably expected the clerk to have died from the foot wound. There are many situations that might dictate differing answers to you in this first special issue.

The second special issue deals with a prediction on your part as to the future of the defendant. We are asking you if the defendant probably will commit criminal acts of violence in the future that will constitute a continuing threat to society. There will be no legal definitions as to what the term probability means. In my mind, it means more likely than not. Is it more likely than not that the defendant will commit criminal acts of violence that will constitute a continuing threat to society.

Criminal acts of violence, obviously, cover a myriad of fact situations from the minimum of a Class C assault, where someone touch [sic] you on the shoulder and you find that offensive – that is a Class C assault – to the other extreme of capital murder, and all the crimes that fall [p. 1636] in between, rape, robbery, kidnapping, assault, crimes against property. Someone takes their Harley-Davidson on the front lawn of Cy-Fair High School and does doughnuts on the front lawn, that is an act of criminal violence. The act of criminal mischief, and in viewing the defendant, do you feel that he probably will commit these acts of violence to the extent that he will be an ongoing or continuing threat to society. Once again,

the State must prove this to you beyond a reasonable doubt.

Obviously, there is testimony that might be proper or relevant that you might hear on the punishment phase of the trial that will assist you in answering this issue. You will be entitled to hear about past criminal record, if the defendant had on [sic]. You would be entitled to hear about criminal offenses he may have committed. You will be entitled to hear reputation testimony from people who know him as to his being a peaceful and law-abiding person or not being a peaceful and law-abiding person.

On the contrary, you may infer from the silence of the Assistant District Attorney [p. 1637] with regard to the defendant having no criminal record and not have any extraneous offenses or bad reputation witnesses, that the defendant would be a person who would not likely commit these acts of violence in the future. Once again, we are seeking to find twelve people who have an open mind as to the answering of these special issues. Is there anything about the discussion up to this point, Mr. Arney, that presents any difficulty for you?

A. No, sir.

Q. As I said previously, there are a minimum of two special issues that are presented on the punishment phase of the trial. There is a possibility that a third special issue will be presented to you if it is raised by the evidence. The first two are always presented and possibly a third, if it is raised by the evidence. We are going to say when something is raised by the evidence, it's not required an ongoing group of witnesses to testify that something took place. There is – if there is one line of testimony from one

witness as to this issue being raised, our law requires that I present this issue to the jury. All of these issues [p. 1638] are creatures of legislative intent, creatures of legislative intent. Our legislature has said these are the proper factors for the jury to consider in determining whether or not the defendant should live or die.

The third special issue calls upon the jury to evaluate actions taken by the defendant and the deceased before the deceased was killed, to view the total confrontation between the two people and then to evaluate their actions. This is not meant to be an act or special issue in which you reflect upon whether or not the defendant exercised self-defense in shooting the deceased. A person who has been convicted of capital murder cannot claim self-defense. A person walks in the store and shoots the clerk and kills him after the clerk has pulled a pistol and fired first, the defendant cannot claim self-defense because he has provoked the difficulty by walking in the store and attempting to rob the clerk. However, if the clerk in some way provoked the difficulty by his actions and his actions contributed to the total situation that resulted in his death, then you, as a juror, would be called upon to review these [p. 1639] actions and to decide whether or not the defendant was reasonable or unreasonable in taking the clerks life. This is a difficult issue to comprehend because I have the difficulty in my mind in the fact situation to the extent that the taking of another person's life is reasonable. However, this special issue, once again, is a road sign that the legislature has given the jury to stop and think whether or not they are making an appropriate punishment, recommending in taking the life of the defendant by voting for capital punishment or

do they think that life imprisonment would be more proper. But we are saying compare the actions of the defendant against whatever provocation, if any, that the deceased may have done that contributed to the total situation, and then, apart from the death of the deceased, determine whether or not the defendant was reasonable or unreasonable in taking the deceased's life.

Once again, let me give you a couple of examples to show you there may be varying fact situations that might cause you to answer this issue differently.

Assume you have the same young man who [p. 1640] goes into the store with the same old pistol with the same old one bullet in the chamber. He has taken money from the clerk, and he is as scared as he can be, still not intending to hurt anybody. He has turned to leave the store with the money, and he is putting his pistol in his belt, and he is one foot from the door. No one has been harmed in any way. As he puts his hand on the doorknob to leave, the store clerk pulls a pistol from under the counter and shoots and strikes him in the shoulder and leg and he falls to the floor, and as he is laying there wounded on the floor, the clerk runs toward him with the pistol and the hammer is pulled back and the clerk has aimed it at him, and he can see that the clerk is going to kill him as he lies there, and out of an act of self-preservation, he pulls the pistol from his belt and shoots and fires at the clerk and the clerk dies. In viewing that situation, the defendant is guilty of capital murder. The best he can receive is life in the penitentiary.

A Uh-huh (Yes).

Q But in viewing that situation, you can see that had the clerk not pulled the pistol from under [p. 1641] the counter, not pursued the defendant and fired at the defendant, he very likely would not have lost his life. He would have lost money but not his life, and in viewing the actions of the clerk, you possibly could say, "Well, the clerk did provoke the situation, and I do not find that the defendant was unreasonable in taking his life in light of what the clerk did."

On the contrary, you might have a cold-blooded killing situation where the clerk stands there defenseless with his arms raised and he is gunned down in cold blood. You may say in that situation that, "Yes, the defendant did act unreasonably in taking the life of the deceased." Again, there are different situations that dictate different answers, and the underlying thought or requ[illegible] that I have is that you keep an open mind on all of thse[sic] special issues until the testimony is completed and then formulate your decision. Do you feel you could have an open mind as to these issues?

A Yes, sir.

Q Is there any question you have with regard to what I have talked about up to this point?

[p. 1642] A No, sir.

Q I think this pretty much completes what I wanted to talk to you about. Mr. Hobbs, the Assistant District Attorney, will speak with you first, and then Mr. Mock, on behalf of the defendant, Gary Graham, will speak to you.

Mr. Hobbs?

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Thank you, Your Honor.

Good morning, Mr. Arney. In your teaching of history and English, that is on a high school level?

A No, I'm in junior high.

Q Junior high school?

A Junior high school.

Q In the junior high there, what grades are included?

A Eighth grade. I teach eighth grade.

Q In looking at – when you say petty theft and car stolen, are those two separate instances?

A Yes.

Q In the instance where your car was stolen, was [p. 1643] it ever recovered?

A Yes, it was.

Q In looking at your jury service on the criminal cases, you have served in a robbery case and kidnapping case, is that correct?

A That case was the same thing. That was one occurrence.

Q Okay. Was the jury able to reach a decision in that case?

A Yes, it did.

Q Anything about your service as a juror that caused you any problem?

A No, sir.

Q I see that your wife is an executive. What type of operation is the company that she works for?

A They insure oil wells and lot of international insurance.

Q Oh. In looking at the aspect of robbery, do you remember the elements that robbery consist of in the State of Texas or would you like a little review?

A I really do not remember the details of it.

Q Robbery is defined in the Penal Code as the person commits the offense if, in the course of [p. 1644] committing theft and with the intent to obtain and maintain control of the property, a person intentionally, knowingly, or recklessly causes bodily injury to another or intentionally or knowingly threatens or places another in fear of imminent bodily injury or death and if they cause serious bodily injury, it becomes aggravated robbery or using a deadly weapon in the threat without causing bodily injury, it becomes aggravated robbery. We will be using – I ask because it is an element in our offense.

You are an acquaintance with police officers and officers in law enforcement. In any way, would that prejudice you one way or the other?

A No.

Q Okay, and you have been teaching – for the last twelve years, is that correct?

A Yes, sir.

Q Where did you teach in Houston?

A Tyler Junior High School, Pershing Junior High School, Black Junior High School, and Clifton Middle School.

Q And since you deal with individuals that are young in your teaching, you understand the law of the [p. 1645] State of Texas, I'm sure you are well aware of when an individual, when he reaches the age of seventeen, he is an adult for all purposes of the law and the punishments thereon. Does the fact the youth of an individual, would that cause you, if you believed beyond a reasonable doubt, to treat that individual differently, say, a young individual than one that is thirty-five, forty, or sixty?

A I don't think so.

Q Okay. Now, what must the State prove beyond a reasonable doubt? Well, beyond a reasonable doubt, needless to say, is not beyond all doubt or beyond a shadow of a doubt. If it was beyond all doubt, you would have to have been present and seen what happened, and if that were the case, you would be a witness and not a potential juror.

The elements of the offense, needless to say, are important, and I would like to go over them with you. We have to prove beyond a reasonable doubt these things and only these things: that is was the defendant, Gary Graham; that it occurred in Harris County, Texas; that it was on or about May 13th, 1981; that while [p. 1646] in the course of committing or attempting to commit the

robbery of Bobby Grant Lambert, the conjunction and is there, but in the charge, it will be either one – intentionally caused the death of Bobby Grant Lambert by shooting Bobby Grant Lambert with a gun. Murder plus robbery. Do you have any questions on that, sir?

A No.

Q Okay. Now, I would like to give you a hypothetical situation that will be the basis of my next question for you and also will be the basis for discussion of these three special issues that occur in the punishment phase to be reached.

In the commission of robbery – before I get into it – in the course of committing theft if you'll look at the board there, sir, means conduct that occurs in an attempt to commit, during the commission of, or in the immediate flight after the commission of theft. In essence, robbery by its very definition can occur as an offense without any property being taken whatsoever. Do you have any problem with that?

A No.

[p. 1647] Q If I walk up to you and grab a pen out of your pocket and knock you down, I have committed robbery. If I pull a gun and demand your wallet and a police officer comes up behind me and say, "Drop it," I have committed aggravated robbery. Say in the instance I grab your pen, turn around, didn't say anything, walk away, and you came up and touched me on the shoulder and I turn around and knock you down, I have committed robbery by force and the bodily injury. No problem?

A No.

Q The fact situation I would like to give you is this: Let us assume that this courtroom is a Seven-Eleven store. Let us further assume there are four people present, that Mr. Arte, the legal intern, is here in an area of the store such as this with an obstruction from the rest of the store such as this banister. Further, that Mr. Mock is where you are, and from where you are now, you have a little bit of trouble, I think, seeking Mr. Pollinger on the other side here.

A Yes.

Q There is an obstruction of a degree as to your [p. 1648] view of Mr. Pollinger?

A Yes.

Q Let us further say Mr. Pollinger is also there, and he is operating the store and he is the clerk behind the register. And, further, as the fourth individual is that Mr. Thornton is present inside of the courtroom, inside of the store also in an area such as he is here, where he can see both Mr. Mock where he is at, Mr. Arte here, and Mr. Pollinger where he is at. Let us further presume that this is toward the end of the shift that he is working on in the store and that he has closed out his register for his shift and taken out the money that will be dropped. He has placed it inside of a commercial drop bag, a zip-up bag, and stuck it into his coat pocket that he is wearing and part of it sticks out above so you can tell it is a money bag and has something in it. Further, let's presume that while he is waiting for his replacement to come in, he is holding a box and stocking the shelf in back of the counter, in back of the register, and that I am going to be the perpetrator of the crime. I come in and I approach Mr.

Pollinger. I see the money bag [p. 1649] protruding from his pocket, and I move forward to take it from him when I get there, and I touch him and Mr. Pollinger still holding the box turns away from me to get away from my grip. When he does that, I pull a weapon and I start up with the weapon. Okay?

A Yes.

Q Mr. Mock, who is in the position you are, might hear some commotion, but he can't see what is happening over there. Mr. Arte has glanced over in that area, and the first thing he sees and the first thing that draws his attention and he concentrates on is that pistol that I have got. He hits the floor and it's probably out there. He is not watching me, nothing else, and he is just making love to the floor. Now, Mr. Thornton is – sees me pull the pistol on Mr. Pollinger as I am coming up with it, and he hollers at me, and when he hollers at me, I turn and look at him, and then I turn back from him and by this time. Mr. Pollinger has backed away from me. He has got loose from my grip I had on him and he is backing away a few feet. I turn and shoot him in the chest and kill him. Then, I run and leave. Let us further [p. 1650] presume and make it a little bit more difficult, and let's say when I am apprehended that the weapon that I used is not recovered, that while I was in the store that I didn't leave any prints that anybody could get if I touched anything, and that if I took any property, if any, I didn't – they didn't find anything on me. So I'm charged now with capital murder and I'm, being tried for capital murder, murder during the course of committing a robbery. You are one of the twelve jurors, one in the jury box. Let us further presume that you believed in your mind the State had

proved beyond a reasonable doubt first that the offense occurred in Harris County, Texas; that it was on or about a specific date; that the death of Mr. Pollinger occurred by shooting him with a gun; that it occurred during the commission of or attempt to commit the offense of robbery. The only element remaining is am I the one that committed the offense. Identity. Let us presume from the fact situation there, Mr. Arte has been on the floor and didn't see me. Mr. Mock was where you are and didn't see me. Mr. Pollinger is dead. Mr. Thornton is called to the stand, [p. 1651] and he testifies. He testifies to the fact that I saw Carl Hobbs, the defendant, shoot and kill Mr. Pollinger on the date in question. If you believe that beyond a reasonable doubt – I'm saying if you believe that beyond a reasonable doubt, could you, having believed that the other elements had been proved beyond a reasonable doubt base a conviction for the offense of capital murder upon the testimony of a single eyewitness?

A Yes.

Q Okay. Now, regardless of the age of that individual, my age, whether I was eighteen or forty-five or sixty?

A Yes.

Q Now, let us presume for the fact situation now that I have been found guilty of capital murder.

Now, we are going into the issue – to the special issues, and we are going to use the example for helping out. Needless to say, by its mere definition or its – or the thrust of special issue No. 1, you have to look at the conduct of the defendant of the offense of which I have

been found guilty to determine whether I committed the act deliberately and [p. 1652] with a reasonable expectation that the death of the deceased would occur. Does that cause you any problem, sir?

A No.

Q Now, deliberately will not be defined by the Court, as the judge told you. Webster defines it as willfully or voluntarily. Does an immediate definition come to your mind outside of those?

A No.

Q Okay. Now, deliberately, I think we would agree just by definition doesn't mean to be premeditated, that one can do a deliberate act without much thought. If I walked over to the cooler and knocked off these paper towels, that's a deliberate act. The question of the reasonable expectation that the death of the deceased would occur. Well, depending on the fact situation, you would have to look at that and make a judgment, once again, based on your common sense, what the burden of proof for the State to prove to you beyond a reasonable doubt based upon the evidence that it was a reasonable expectation that the death would occur, and it was a deliberate act.

In the fact situation that I have [p. 1653] given in the example there on whether or not one might look to the area of – where I shot the deceased. If I shot him in the foot, that might be something else. If I shot him in the chest or the head or the temple area, that might increase your opinion of whether or not it was a reasonable expectation that the individual would die.

Let me give you another fact situation. Maybe it's to the extreme, one way or the other, that, say, I walked in and I'm going to rob Ms. Slessinger. She is in the store, and I don't think there is anybody else there in the store I walk up to her and pull a gun and demand the money from the register. She is not moving as quickly as I think she ought to, and I'm going to speed her up, so I take the gun, point it to the floor, and intentionally pull the trigger. That's a deliberate act. I fire a shot into the floor, which ricochets off to the side, goes through a rack and hits and kills Ms. Hamilton, who is on the other side of the rack of the potato chip area. Do you understand that under the law, I have committed – in the course of committing robbery, I have done a [p. 1654] deliberate act that caused the death of the individual, an intentional act? I'm guilty of capital murder. You would have to ask yourself whether or not that was a reasonable expectation that the death of the individual would occur. I think that one in looking at your common sense and your viewpoints on that is whether or not my – the mere fact I took a weapon in the first place might be a factor that I might have to use it or maybe not in the example that the judge gave you, but there is just no set pattern.

Moving to the Special Issue No. 2. There I think you come into an area where there is the question of probability. The judge gave you his definition, but he will not give you a legal set definition. You will have to use your own. Does one immediately come to mind for you, sir, when you talk about probability?

A Yes.

Q What is that, sir?

A Probability would mean there would be a reasonable chance this might occur somewhere along the line.

Q Now, as to that issue, I think that you might [p. 1655] agree with me, sir, that the facts of the case which you have just heard and passed judgment on the guilt stage could give you some insight as to this individual's propensity one way or the other. Regarding Special Issue No. 2, the Court may allow evidence that it deems proper and pertinent to be admitted during this stage of the trial that you didn't hear in the first stage. If there is any, such as a prior criminal record, if any, other acts of criminal violence, if any, reputation, good, bad, or indifferent, maybe not, but other evidence that would aid you in determining if there is that probability to make your judgment beyond a reasonable doubt.

Criminal acts of violence – I think the judge went over it quite well with you. Do you have any questions concerning that?

A No.

Q The aspect of society in a broad sense that the judge used is also, would you agree, that the individuals that are confined as either prisoners or the guards or the officials of a prison system are also part of our society, and I would submit that this question also goes to that issue. [p. 1656] Would the individual be a threat to those people? Possibly. Do you have a problem with that concept?

A No.

Q Okay. Always, as to any capital murder case, as the judge told you, those first two special issues will

always be presented and that the State's burden is to prove that the answers should be yes to those beyond a reasonable doubt. Now, let us assume that we are at this phase of the trial and only those two issues have been presented, and, further, that you believe beyond a reasonable doubt in your own mind that those – that the answers should, in fact, be yes beyond a reasonable doubt in your mind. Could you, knowing that yes answers – and the other eleven members, it would have to be a unanimous verdict – that those answers would result in the Court, by law, be assessing the death penalty – could you, knowing that is the result, answer yes if it was a proper answer?

A Yes.

Q Now, as to Special Issue No. 3, it is a difficult – it's more difficult. Maybe it poses some [p. 1657] problem, but I think by breaking it down, I would think that one wouldn't have too much problem. I would say we are going to look at unreasonableness and provocation and the actions of the two people, the person that was killed and the person that did the killing. I think if raised by the evidence is the key phrase there. If it is just the minute type of – no matter how farfetched it might be – it has got to go under the law.

The question that you have is provocation, if any, looking at the actions of Mr. Pollinger in my example – what he did. When you look at what he did, you have to decide was it, in fact, provocation. If it wasn't provocation, then my killing him was unreasonable. If you decide in your mind there was provocation, then the question becomes was it reasonable or unreasonable. If it was

unreasonable, the answer should be yes and death would result – and if the answers to 1, 2, 3, are yes, it's death. If it's no – you might answer that one way or the other.

Let me give you an extreme. Remember the judge's example about the guy going out the [p. 1658] door after he was shot twice and the individual coming back up?

A Yes.

Q You may or may not say that was provocation depending on the fact situation and what happened immediately preceding that caused the death of the deceased. Do you have any problem with that concept, sir?

A No.

Q So, using just good common sense in looking at those special issues and you would apply the same burden of proof, beyond a reasonable doubt, that you exercised even though this is a capital murder case, that you exercised as a juror on those other cases? Could you not do that, sir?

A Yes.

Q Are there any questions, sir, that you feel that you would like to ask me or something that I might have confused you with that you would like clarification on?

A No.

MR. HOBBS: Thank you very much. Pass.

THE COURT: Mr. Mock, you may proceed.

[p. 1659] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q Mr. Arney, the last question Mr. Hobbs asked you, would you use the same judgment you used on the prior cases that you served on in this case does not mean, sir, that you would automatically feel some kindred spirit to one side or the other, does it, sir?

A No.

Q You would still require the State to assume its burden and prove to you beyond a reasonable doubt that Gary Graham was guilty of the offense of capital murder before you could find him guilty of capital murder?

A Absolutely.

Q Also, sir, that as he sits here, he is presumed to be innocent until the State meets its burden of proving guilt beyond a reasonable doubt. Could you give him that presumption of innocence?

A Yes, sir.

Q You don't think he must be guilty of something or the great State of Texas would not bring him to trial if he had not done something?

A No, sir.

[p. 1660] Q Okay. I see you have a fourteen-year-old child. Is it a boy or a girl?

A A little girl, not little, but a girl.

Q What school does she go to?

A Jersey Village High School.

Q What grade is she in?

A Ninth.

Q Is she driving you crazy?

A I'm getting to that point.

Q I have one that is fourteen. I don't know if she is going to lose or I'm going to lose. Mr. Arney, also in these kind of cases, this is the only type of offense for which one cannot waive or give up his or her right to a jury trial to assess punishment if found guilty. The Code of Criminal Procedure mandates that prior to the selection of a jury, we voir dire jurors individually, and during that voir dire, we talk to them about various things that might occur. One of those things which might occur but not as a certainty would be the finding of guilt. Do you understand if there is not a finding of guilt, we do not get to the punishment stage at all?

A Yes.

[p. 1661] Q And because we are talking to you about punishment at this time, we are in no way anticipating a finding of guilt.

A Yes, sir.

Q So you would not hold it against us that we are talking punishment to you before you have even heard the facts of the case, would you?

A No, sir.

Q Okay, would you share with me, Mr. Arney, in your own words, your feeling about the death penalty as

an assessment of punishment in general? I don't want to dissertate you. I want to know how you feel.

A I have thought about it a great deal, much prior to this. What I feel is it is necessary but only in extreme cases.

Q Okay, but you have come to grips with that inside yourself that if a person would be found guilty beyond a reasonable doubt, that would not automatically necessarily mean that they would be assessed or should be assessed the death penalty?

A I beg your pardon?

Q Just because a person has been found guilty of the offense of capital murder, you do not [p. 1662] feel that they should automatically get the death penalty?

A No.

Q Okay. But, converse to that, if the State meets its burden and proves to you beyond a reasonable doubt all those special issues should be answered yes, knowing that the end result would be death, could you divorce yourself from any emotions you might have from making a decision in answering those questions?

A Yes, I think so.

Q Okay. Special Issue No. 1 is a two-phrased sentence. The first goes to deliberately. A person doing something deliberately. First off, you've got to find that person did what they did deliberately. Do you have any problems with that?

A No.

Q The second part you would have to analyze as to whether the person had a reasonable expectation that the death would occur regardless of the deceased or any other person. Would you have any problems, sir, breaking those two down separately and analyzing them separately before you came to a conclusive answer, yes or no, to [p. 1663] the total Issue No. 1?

A No.

Q Okay. Can you see, sir, in your mind a set of circumstances where one would possibly shoot somebody and not have the expectation that that person would die?

A Yes.

Q Do you think, sir, that a person – if a person has a weapon and commits an offense, he automatically intended to use that weapon in the commission of the offense?

A No.

Q Now, the State in answering – in asking you Issue No. 1 or presenting evidence, if they chose to do so on Issue No. 1, is not required to show you a motive or why somebody did something. Would you automatically vote yes to Special Issue No. 1 because you don't know why someone did anything?

A No.

Q Special Issue No. 2, sir, goes to probability that one would tend to commit violent criminal acts and would therefore become a continuing threat to society. What kind of information, sir, if they were available to

you, would you [p. 1664] like to have to assist you in making that determination?

A Background, previous acts, things that had happened prior to this.

Q Would it be a fair statement, sir, to say you would like to have as much overall information as you could possibly have in determining your answer?

A Yes, Sir.

Q Special Issue No. 3, sir, goes to the reasonableness or unreasonableness of the defendant in killing somebody. The burden of proof as to the conduct being unreasonable is still on the State. Would you, sir, shift the burden to the defendant to make him show you anything, knowing he doesn't have to testify? We don't have to do anything? Would you shift that burden to the defendant to make him show you what he did was reasonable as opposed to the State showing you that it was unreasonable?

A No.

Q Okay. What, sir, does provocation mean to you?

A Being driven to respond to something.

Q Would you say, sir, that provocation could be not only actions but words?

[p. 1665] A Certainly.

Q How do you define reasonable?

A That is a good question.

Q And, again, as Mr. Hobbs and the judge have told you, there are no right or wrong answers. What we are trying to do is get to know you in a short period.

A Reasonable, within what is normal behavior within the confines of society.

Q Okay. That is very fair. As it relates to Special Issue No. 3, sir, I think you must understand by now that we are not talking about self-defense.

A Yes, sir.

Q It is confusing even – well, even to me because I'm no great brilliant legal scholar, but it is confusing to me as a person that has to deal with it on an ongoing basis because it is actually – if it weren't for the other elements, it would be basically a self-defense issue, but it goes to, I would imagine, mitigation would be a better word as opposed to justification. Do you have any problems with that?

A No, sir.

[p. 1666] Q Can you see, sir, a person in his own place of business, somewhere he has a right to be doing what he has a right to be doing, someone comes in and tries to rob him, his feeling is that I'm protecting my property. I have worked hard for my property, and I'm not going to give it up freely and voluntarily just because someone comes in with a gun and demands my property. So in an effort to protect his property, as he has every right to do, he makes a move. When he makes that move, we don't know what he is moving for because as he makes the move, he is killed. He is shot. The person there robbing him sees him make the move and in reaction to

that move, he shoots him. Could you, sir, conceive in your mind a set of circumstances, and I am not asking you to give me a fact situation, but conceive in your mind a set of circumstances where the act done by the defendant in response to whatever provocation might have occurred would have been reasonable in light of that provocation?

A Yes.

Q Sir, are there – is there – you teach English, don't you?

[p. 1667] A Yes,

Q Is there any reason whatsoever that you might feel that you could not be a fair and impartial juror in sitting and listening to the facts of this case in determining guilt or innocence or punishment?

MR. MOCK: That would be all, Your Honor.

THE COURT: What says the State, Mr. Hobbs?

MR. HOBBS: The State will accept.

THE COURT: What says the Defense?

MR. MOCK: We will accept.

THE COURT: Mr. Arney, will you stand and raise your right hand and be sworn as a juror, please?

(At this time, juror sworn.)

THE COURT: Mr. Arney, this will conclude your service for today. We anticipate that we will complete jury selection by the end of the week and we will begin testimony on Monday, the 26th, we think. We do

not envision the trial taking more than one week to try. The trial will be tried in the courtroom which is on the fourth floor of this building. [p. 1668] We have phone numbers we can reach you at as to your home phone number. Does the school have a number that you can be reached at?

A It's Arnold Junior High School. Arnold Junior High School at Cypress-Fairbanks.

THE COURT: Mr. Pollinger will give you a call on Thursday or Friday to let you know if we will begin on Monday, the 26th. With that, you are excused. I don't anticipate there being anything in the paper about the facts in which case. If there happens to be something, don't read it or watch TV. Thank you very much, Mr. Arney. If you need anything to show you have been here, my clerk, Ms. Hamilton, will give you that. With that, you are excused.

[p. 2191] MS. MARY ANN GAYLORD, called as a prospective juror, after having first been duly sworn, testified as follows:

EXAMINATION BY THE COURT

Q Good afternoon, Ms. Gaylord. Are you a friend of Sherwood Stewart that plays tennis out at Dewes Creek?

A No.

Q Let me spend a little time going over your personal data form. You said that you or a member of your family has been a witness in a criminal case, is that true, ma'am?

A My brother, is that family?

Q Yes, ma'am.

A He is – he worked for the Government and he does a lot of testifying in cases dealing with fraud.

Q Okay.

A I didn't – the girl told me I needed to write yes and I could explain.

Q You or none of your family have been a victim?

A No.

Q I noticed that you have an 18 year old child, is that a son or a daughter?

[p. 2192] A It is a stepson.

Q The defendant in this case, Gary Graham, is 17 years old. He is accused, obviously, from what I told you

before, of the most serious crime that we have which is the offense of capital murder, and I would instruct you, as I did before lunch, that if you serve as a juror in this case and at the close of the testimony you are convinced beyond a reasonable doubt that he is guilty of the crime that he is accused of committing, then out [sic] law would say that you must vote in accord answers with your belief and find the defendant guilty of the crime that he is accused of committing. Obviously, if you do that, as I have told you before lunch, that if he is found guilty of the offense of capital murder, the jury has only two alternatives for punishment that can be assessed by the jury and that is life in the penitentiary or death by lethal injection. As I told you, the State has the burden of proof beyond a reasonable doubt, and as I further said it does not have to prove its case beyond a shadow of a doubt or beyond all [p. 2193] doubt.

So obviously, everyone is concerned about the jurors being able to follow the law as it is.

Let me ask you this. You have an 18 year old stepson. The defendant is 17 years of age. Do you think that the fact of the age of the defendant might influence your verdict one way or the other?

A No, I feel like it would be the act, the evidence.

Q I also told you and we have talked about it just now that because of the fact that the defendant is accused of the offense of capital murder, if he is convicted and those are the only two alternatives for punishment, do you have an opinion with regard to the question I voiced before lunch with regard to the issue of capital punishment? Do you have an opinion one way or the other,

either for or against capital punishment, you don't have to tell me what it is, but do you have an opinion?

A Yes.

Q Do you have any conscientious, religious or [p. 2194] moral scruples against the imposition of the death penalty in a case that you would consider to be a proper one?

A No.

Q I take it, then, what you are telling me, ma'am, then, is if you felt it were a proper case for the imposition of the death penalty, you could participate in a verdict in which the death penalty was returned, is that right?

A Yes.

Q As I also told you before lunch, the jury in a capital murder case does not communicate its verdict to the Court by signing a blank piece of paper and sliding it out to the Judge writing life or death on the paper.

The jury answers special issues that are submitted in a Court's charge, and the issues require an answer of either yes or no.

It is the way these issues are answered that determine what the defendant's punishment will be.

If the jury answers all of the issues yes, the defendant will receive death by lethal injection. If the jury answers one or more of the issues no, the defendant will [p. 2195] receive life in the Texas Department of Corrections. This is, once again, assuming that he is found guilty of the offense of capital murder.

A Right.

Q We are seeking 12 people that have an open mind and can only reach their decision after all the evidence is presented and after which they have determine [sic] whether or not it is an appropriate case for the death penalty. Do you feel that you could do that, Ms. Gaylord?

A Yes.

Q Okay, a couple of more notes of discussion about the punishment phase. A yes answer to any of the issues or all of the issues requires a unanimous agreement among all 12 of the jurors. On the punishment phase, all 12 must agree that the issues should be answered yes. If the issues are answered yes completely across the board, the defendant receives the death penalty.

A no answer, on the other hand, requires a vote of 10 or more. If 10 or more of the jurors feel that the no answer is appropriate, that is sufficient to sign the [p. 2196] verdict form as to that particular special issue and the result would be that the defendant receives life in the Texas Department of Corrections.

The State of Texas has the burden of proof on the punishment phase as it did on the guilt or innocence phase. The State must prove to you beyond a reasonable doubt that the defendant should receive the death penalty.

By the way you answer these special issues, the jury answers the issue and communicates their wishes to the Court, and then I, as the presiding Judge, assesses the punishment in an agreement with the manner in which

the issues are answered by the jury. I do not have the discretion to change anything.

There are a minimum of two special issues and a maximum of three that are submitted in the charge. There are no legal definitions that will be included in the charge on the punishment phase as to the meaning of any of the terms included in the special issues. It is a matter of common knowledge and common interpretation of the jurors.

[p. 2197] However, I will discuss all of the issues with you to give you a preview as to what these issues are and try to give some explanation or discussion with you so that you will not be unfamiliar with them if you do serve as a juror and do reach the punishment phase of the trial.

If you would turn to your right and look at the first two issues that are attached to the bulletin board.

A Yes, sir.

Q The first two on the right. Read those two and then we will talk about them.

A Yes.

Q Have you had a chance to read those first two issues, Ms. Gaylord?

A Yes.

Q Now, once again, assume we are on the punishment phase, assume you have found the defendant guilty, hypotehetically [sic] speaking, you have found this person guilty of taking the life of another human being while he was in the course of committing another felony

offense, and you have heard testimony on the guilt phase of the trial which pertains to the [p. 2198] defendant taking the life of the deceased, in the testimony surrounding the taking of this person's life.

Now, when you get to the first special issue, on the punishment phase, we are asking you two questions. We are asking you to review the conduct in which you were informed about the defendant's taking the life of the deceased and we are asking you whether the conduct of the defendant that resulted or that caused the death of the deceased was committed deliberately, number one and was there a reasonable expectation that the death of the deceased or another person would occur. So those are the two.

A That is at the initial time of the crime, right?

Q This is the facts surrounding the killing. Generally speaking, there is a minimal, if any, further testimony presented on the punishment phase with regard to the facts surrounding the crime.

Generally, you have already heard that on the guilt phase of the trial. Okay, but we are asking you to think back to the [p. 2199] testimony that you have heard about the taking of the individual's life by the defendant. We are asking you two things.

Number one, when he embarked upon this conduct that resulted in the taking of the life, did he do it deliberately and number two, did he reasonably expect that he would be taking the life of the deceased?

Let me give you a couple of examples. Assume that there is a young man in Baytown, who has a wife and family that are at home and are very sick.

He has lost his job. He can't get a job anywhere. He has tried. His unemployment benefits have been exhausted, and he has no other way he is going to get anything, and he is fit to be tied about the concern of his family.

Out of frustration, he takes the pistol he had with the one bullet and he goes to a Stop-N-Go. He walks in the store, intending to take money from the clerk, but not intending for anybody to be hurt or harmed. As he walks in the door, he slips on a wet piece of pavement where someone has [p. 2200] spilled a coke on the floor, and his feel [sic] fly out from under him. He hits the ground and the gun has flown from his hand and the gun hits the floor and discharges and the clerk is killed. The clerk is behind the counter.

In viewing that situation, you might say that the defendant went in there deliberately, intending to commit the robbery or take money.

However, the question is did he reasonably expect that the clerk's life would be taken. In that situation, you might very well answer it no he did not reasonably expect to take the clerk's life, and another situation might be one where he goes in and takes the money from the clerk, and as he starts to run from the store, the clerk starts chasing him.

He turns around and fires at the clerk's foot to stop him and shoots the clerk in the foot, and falls and hits his head on the counter and he dies from the blow.

Once again, that person could once again be charged with capital murder, but the question becomes did he reasonably expect to take the life of the person when he shot him [p. 2201] in the foot. Once again, you might say no to that situation.

And I want to reurge for your situation the fact that the State must prove to you beyond a reasonable doubt that it should be answered yes. So if you have a reasonable doubt, then, my charge to you would say you should answer it no. Do you understand that?

A Yes.

Q In contrast to these two situations would be one where a person walks into a store and takes money from the clerk and guns him down in cold blood, cold blooded killing.

Obviously, in that situation, you very well might answer that yes, but the point I am trying to emphacize [sic] is that we must have 12 people who have open minds and won't answer this issue until all the evidence is presented.

The second special issue is calling upon you to make a prediction in the future.

Once again, the same burden of proof applies. However, the State must prove to you that there is a probability that the defendant will commit criminal acts of violence in the future that will constitute a [p. 2202] continuing threat to society. There will be no definition as

to probability. That can be viewed in different ways. My interpretation of probability is that it probably will occur, that it is more likely than not, not that it is a certainty, but it is more likely than not to happen.

And the issue is will the defendant more likely than not commit criminal acts of violence which include many, many things, from a minimal class C offense of assault where someone may pull your glasses from your face and touch the side of your head, if you find that offensive, that person is guilty of a Class C assault, to the other extreme, which is capital murder. Many crimes are included in between, robbery, rape, kidnapping, crimes of violence against your property.

In the last phrase in this issue is will this person be a continuing threat or ongoing threat to society. Society not only as you may know it and those folks that walk the streets of Baytown, but also the society that may exist within the Department of Corrections of Texas, and the guards there. [p. 2203] There are many things you can consider in answering the second special issue.

A Yes, sir.

Q You may consider the prior criminal record of the defendant, if he has any. You can consider other criminal offenses he may have committed, if any. You can consider what others who know him say about him, and you can consider the facts of the crime that you found him guilty of committing; and armed with all this, you may answer it yes or if there is an absence of any of these things, you may answer it no, that it hasn't been proven to you beyond a reasonable doubt that element.

Do you have any problems with those two issues?

A No.

Q There is a probability that a third issue will be presented. This, to me, is a more difficult issue to understand, however, it has the same importance as either of the first two.

If a no answer is presented to this issue as with the other two, the defendant will receive life in the Texas Department of [p. 2204] Corrections. If a yes answer is given in conjunction with the two yes answers to the first two issues, the death penalty will result, and in this issue, the third issue is only presented if it is raised by the evidence. If there is one line of testimony from one witness that raises this isuue, [sic] then I must, as a matter of law, present this issue in the Court's charge on the punishment phase of the trial. If you would take a moment to review the third issue, Ms. Gaylord, and then we will talk about it.

A Okay.

Q The third special issue is not a civil defense issue. We are in no way trying to present to the jury an issue of self defense, which might justify the taking of a deceased's life. That cannot be done. If a person is convicted of capital murder and the evidence supports the factual account that he provoked the situation in the first place, hypothetically speaking, by walking into the store with a drawn pistol and he shoots and kills the clerk after the clerk has tried to defend himself in some way, that defendant cannot claim self [p. 2205] defense. He can't claim that he killed the clerk in self defense. He very

conceivably would be guilty of capital murder, and would be faced with this issue which is the third issue in the punishment phase of the trial.

This issue is not an issue of justification. We are not saying that the taking of the clerk's life or the deceased's life was justifiable homicide. This is once again a creation by the legislature, which in my mind, is an issue of mitigation. It is a third stopping point that our legislature has deemed appropriate for jurors to stop and consider differing factors of the crime, itself, or the person's of the defendant and to determine whether or not it is appropriate that the defendant receive life or death.

We are in no way trying to infer that the deceased has done something wrong. We are not saying in this issue that it is wrong for a person to defend his property or himself or herself, the legislature has deemed it appropriate that if the deceased in some way has in his conduct contributed to or provoked the situation by some form of [p. 2206] provocation, then the jury must evaluate his conduct in light of the conduct of the deceased and make a determination whether or not the defendant was reasonable or unreasonable in his actions in taking the life of the deceased. It is difficult to understand, it is hard to think that a person would not be acting unreasonably in taking the life of another person. So this issue presents some difficulty.

However, the legislature is saying, jury, you must consider this when you are making a decision as to whether or not another human being will live or die.

Let me give you an example that may visualize this issue I am trying to explain to you.

Assume we have a young man again that has gone in the store, taken the money from the clerk, has not spoken loudly or harmed anyone or not struck anyone. He turns to leave, places the pistol in the belt of his trousers, walks all the way to the front door and reaches out when he is struck in the back by the bullets that are fired by the clerk and [p. 2207] falls to the floor. The clerk runs at him with a drawn pistol and the hammer held to the rear and the person knows if he doesn't do something he is going to be shot to death there on the floor, so he out of an act of self preservation, not self defense, but preservation, pulls his pistol out and fires and shoots the clerk and the clerk dies. In the eyes of our law, that person is guilty of the offense of capital murder. He can't claim self defense because he committed the robbery in the first place. The clerk was defending his property.

However, in that situation, you very well might say objectively that the clerk, had he not done anything, would not have been harmed in any way, but by pulling the pistol from under the counter and pursuing the robber there on the floor, contributed to the situation by pouring gasoline on the fire.

If the jury determines that to be provocation, what the deceased has done, it may be something less than that, but assuming that is our example, then the legislature has then demanded that the jury must evaluate [p. 2208] those actions in determining whether or not the defendant was reasonable or unreasonable in his actions in taking the life of the deceased. Once again, it is not justification. It was mitigation. they are saying if the deceased did something to provoke the situation, stop

and think, did the defendant act reasonably or unreasonably? Should the defendant live or die?

Do you see what I am driving at?

A Yes.

Q Do you have any problems understanding any of these issues?

A No.

Q Do you feel like you can have an open mind on all of these issues?

A Yes.

Q Okay, any questions about anything I have talked about?

A No.

Q I think that pretty much sums up everything I wanted to speak to you about. As I told you, Mr. Hobbs will have a chance to speak with you and Mr. Thornton on behalf of the defense will have a chance to speak with you. Mr.

* * *

[p. 2109] Hobbs?

MR. HOBBS: Thank you, Your Honor.

EXAMINATION BY THE STATE

QUESTIONS BY MR. HOBBS:

Q Hello, ma'am. I guess the first thing I need to ask you is your feelings about the death penalty. Do you have a position that you developed over a long period of time?

A Well, my feeling, I have had it for a long time.

Q And that is?

A That is that some cases I think the death penalty is warranted.

Q Okay, now, in discussing with the Judge, this concern in reference to ones age. This is a severe crime alleged. The punishment possibilities are the severest that exist. Age would not in and of itself be the controlling factor in your decision?

A No.

Q The burden of proof, does that give you any problem, beyond a reasonable doubt?

A No.

Q Not beyond all doubt, because if it was beyond [p. 2110] all doubt, that is an impossible burden. You would have to have been there and saw what happened and if that was the case, you would be a witness, and not a juror. Beyond a reasonable doubt, in that burden of proof does not require the State to show a motive. We don't have to show why he did what he did.

The defense doesn't have to do anything. Doesn't have to put witnesses on. The State can't call the defendant. They can just be there. So, in no essence, that would be an impossible task in most instances, do you agree?

A Yes.

Q Now, conflict. The mere fact we are in a courtroom shows that there is conflict. As a juror, your job would be to resolve that conflict, to decide what, in fact, did happen, and that would be the basic reason of your ruling.

Did the State prove its case to you to determine what the jury would believe?

The jury can believe all of what a witness says, part of what they say or absolutely nothing, and each witness that takes [p. 2111] that stand takes the same oath. Does that pose a problem?

A No.

Q Okay, now, I would like to give you an example that I would use in asking my next question, and then we will also use in discussions of the special issues that the Judge has gone over with you earlier.

Let us presume for the purposes of our example that this courtroom is a 7-Eleven store.

Furthermore, that there are four people present within the 7-Eleven store, that there is an individual occupying a position in the store similar to where – the position you are occupying in the courtroom here, that position being such that Mr. White, the bailiff here at the other end, on the other side of the Judge, you can't see

him from where you are now or if you do see him, you just see parts of him or the back of his head or something. Besides Mr. White and the person occupying the position you are in, you are not there, you are going to be a juror later on, let us say Mr. Mock is also present [p. 2112] and he is in an area of the store such as this jury box is with an obstruction such as this railing present also inside the store and that the fourth person present there in the store is Mr. Thornton, and that Mr. Thornton is in a position that he can see both Mr. White where he is at, Mr. Mock here and the person also occupying your slot.

Now, let us further presume that this is toward the end of the shift that Mr. White is on, Deputy White, and that he is a cashier supervisor during that shift, that he is closed out and that he has taken the money they don't need for the next shift out and placed it into a commercial bank bag and zipped it shut. He has placed that money bag in his coat pocket. Since it is a fairly good size, it protrudes out of his pocket, such that you can see it from the outside.

Let us further presume that as he is waiting for the next shift to come on that he is restocking the shelves in the back of the courtroom where the register is, and that he has got a box of items that he has taken from the box and places them on the shelf, and [p. 2113] I'm going to be the robber. I walk into the store and I see Mr. White placing the items in the shelf. I see the money bag and the money pouch and I approach and I reach to get it because I am going to take it. I'm not saying anything, and I, in my process of reaching and taking that, I'm starting to grab it and before I get there, Mr. White sees me and he

turns, still holding the box and turns away, so I can't grab it.

When he does that, I grab him with my hand, grab hold of him. I come up with a gun, and in the process, Mr. Mock, who is sitting over here, sees me in that location. He isn't paying much attention, but he sees me with that gun and he just concentrates on that gun. He sees the gun. He hits the floor. He couldn't identify me if his life depended on it. The person that is occupying the slot that you are at can't see clearly, if anything. Mr. Thornton is in a position that he sees me holding Mr. White there, that I have ahold of him and I have got the gun. As I am coming up with the gun he hollers at me, I turn with the gun and I look at him and I [p. 2114] look at him right in the face and when I am doing that, Mr. White breaks loose from my grasp and moves back just several feet. I turn, shoot, shoot him in the chest and kill him, and run out of the store. Any problem?

A I understand what you are saying.

Q In the example, I committed the offense of aggravated robbery, and in the process of comitting [sic] that robbery in the course of committing that robbery, I have caused the death of Mr. White.

So we have the offense of capital murder. Now, let us really get tough. Proof beyond a reasonable doubt is the burden that the State has in both phases of the trial.

Now, let's make it tough from the standpoint that when I am caught they don't find the gun that I used to kill Mr. White with. I didn't leave any fingerprints, and in that example I didn't take any property, but let's say if I

had taken property out of the store they didn't find it. They just got me.

Okay, I'm brought to trial and you are a juror now, and I am being tried for the [p. 2115] offense of capital murder, murder during the course of committing robbery or attempting to commit robbery. You hear the testimony and during the testimony you believe that the State has proved to you beyond a reasonable doubt that the offense occurred in Harris County, Texas; that it was on or about a specific date; that it was during the course of a commission of a robbery and that I intentionally caused the death of Mr. White by shooting Mr. White with a gun. The only thing that has not been proved and the only other element left in the offense is who did it. Okay, now, the individual that was in a position where you are now didn't identify me. Mr. Mock was down on the floor and was concentrating on the gun. Now, Mr. Thornton comes up and he testifies and he states, I saw Carl Hobbs sitting right here in that chair with his arm on the jury rail and he is the one that shot and killed Mr. White on the date in question.

My question to you is this: If you believe Mr. Thornton's testimony beyond a reasonable doubt, could you base, and this is [p. 2116] a general theory, could you base upon the testimony of a single witness, base a conviction as a juror for the offense of capital murder if you believed that eye witness beyond a reasonable doubt?

A Yes.

Q Now, in the example we used, let us proceed to the punishment phase. Now, based upon that, I have been found guilty of capital murder, now you, as a juror, with

the same burden of proof and it – there is still no change, it never shifts to the defense. The State has to prove it to you beyond a reasonable doubt.

Special issue number one comes into play, and from what your discussions with the Judge, needless to say, you have to look at the offense itself that you just had to determine by its very content, to answer that question.

Now, deliberately and there will be no definition as they are in the first phase. Does deliberately have an immediate definition that comes to mind for you, ma'am?

A Yes.

[p. 2117] Q Would you please share it with me?

A That would be, not considering anything around him. He just did it or they just did it.

Q Websters has defined it as being a willful or voluntary act?

A Willful.

Q Now, it doesn't mean a premeditated act. It doesn't mean an action, that is the opposite, it is definitely not an accident, and with a reasonable expectation that the death of the deceased or another would occur. Reasonable expectation, well, expectation is, once again, a process that you, as a juror, would have to go in. You might very well look at varying situations that the Judge gave you that presented different types of issues or as in the example that I posed here for you.

Let us go to another example possibly and in looking at these two issues.

It's – say I went up to Ms. Slessinger and she was behind the cash register and I say, I want all of your money and I want it now. I have a gun on her. She is taking the money out of the register, but she is not doing it as fast as I thought she [p. 2118] should be, so I'm going to speed her up. I am in the store by myself there and nobody is with me, and I can't see anybody else other than her, and I put the pistol down to my side and point it at the floor, pull the trigger, shoot, to let her know I mean what I said?

A Yes.

Q The gun goes off. The bullet hits the concrete floor and ricochets off to the side, goes through a counter and the gentleman who was on the other side of the counter shopping, the bullet goes in him and kills him. Now, looking at that situation, you can see that I, my actions, I have intentionally pulled the trigger that caused the shot to go and I was in the course of committing a robbery, and I caused the death of that individual. A deliberate act.

The act, itself. Now, the question becomes a reasonable expectation that the death of the deceased or another would have occurred because of that act. You may or may not see circumstances that would, in your mind, where you would be able to answer that yes or no. You know, not knowing the person

* * *

[p. 2219] was there, and then the other, without motive, you have to look at the fact situation. The mere fact that I

carried a weapon in with the intent to use it, the examples that the judge gave you, you can see there is a [sic] very many types of situations that can come into play.

Do you think you could be fair to both sides in looking at that?

A I believe I could.

Q A reasonable expectation that the death of the deceased would occur. You may ask and find yourself that if I came up and shot you in the foot, it could be a deliberate act and you may or may not believe that to be a reasonable expectation that one would die, but if I shot you in the chest, or in the head that may cause other things to come to mind.

Do you have a problem with that, ma'am?

A No.

Q If you believed beyond a reasonable doubt the appropriate answer to that should be yes, could you say yes?

A Yes.

Q Special issue number two, probability. Does [p. 2220] the definition for probability come to mind?

A Yes, it is possible.

Q Possible, likely?

A Could happen.

Q Okay, criminal acts of violence can be everything from minor assaults to aggravated assaults to rape, robbery, aggravated robbery, murder or capital murder, other types of offenses.

Now, as to this question of probability, I think that you can see that the actions, the offense, itself, would give you some insight as to that individual. You have been able to see how that person reacts in a given situation and under a given set of circumstances, to make some judgment. Do you agree with that?

A Yes.

Q The Judge, in his discretion, can allow other testimony in as to prior criminal record, if any, other acts of violence or reputation testimony. It could be good or bad.

A This is after the guilt phase?

Q Yes, ma'am.

Now, constitute a continuing threat [p. 2221] to society. That is by either his actions – in the evidence you look at. You can look at the evidence presented to you, if any, and make that judgment, could you not?

A Yes.

Q Now, society in a very broad term could even include those people in prison. Can you concede in your mind that an individual or if there are individuals in our society that could be constituted threats to other inmates or people that are there?

A Yes.

Q If you believed, beyond a reasonable doubt, that answer should be yes and you said yes, knowing that if these were the only two issues submitted because it is possible that those two yes answers would result in the death penalty, could you say yes, knowing that that would result?

A Yes.

Q Now, special issue number three, if raised by the evidence, becomes the key factor there, and I think you need to break this down because we are going to be looking at the actions of two separate people, the person [p. 2222] that was killed and the defendant. And provocation, if any.

The first thing you have to look at is you have to look at what the defendant, I mean the deceased did, that person that was killed. That could be many things, from the example that the Judge gave you, on one extreme to maybe doing absolutely nothing or maybe pulling away or hitting the individual. There is a whole lot of things that you could consider, right?

A Yes.

Q You have to look at that and decide in your mind was it provocation, first of all, first of all was there any, and if there was, is it provocation in your mind, if it was provocation, you still haven't answered the question. You have to look at the actions of the defendant in relation to that provocation, if any. If it was no provocation, then the killing by the defendant of the deceased would probably be unreasonable.

If it was provocation in you [sic] mind, then was the reaction or the killing, the conduct of the defendant unreasonable in [p. 2223] response to that provocation, if any, or those actions on the part of the individual being killed. Do you have a problem with that?

A No.

Q You can conceive of circumstances when, as the Judge said, it is not self defense, he is still guilty of the offense, it is whether or not in that particular situation and with that result, was it reasonable under the circumstances as they existed. Once again, you are going back to the fact situation that you looked at in the guilt stage of the trial. Any problem with that?

A No.

Q Is there any reason, ma'am, that you feel you couldn't be a fair and impartial juror in a case such as this?

A I believe I could be fair.

Q Thank you very much. I'll pass the juror.

THE COURT: Mr. Mock?

[p. 2224] EXAMINATION BY THE DEFENSE

QUESTIONS BY MR. MOCK:

Q May it please the Court, Ms. Gaylord, my name is Ron Mock. I would like to ask you a few questions. I assure you that they are not couched in any way to confuse you or trick you.

I would like for you, ma'am, if you would to share with me in your own words your feelings about the death penalty as a means of punishment?

A I feel like the death penalty is warranted in certain instances, depending on the type of death the deceased has received.

Q How long have you felt this way?

A A long time.

Q What grade do you teach, ma'am?

A I have taught 5th and 6th grade. I am presently librarian.

Q Would you, ma'am, be able to give Gary Graham the presumption of innocence that he is cloaked with as he sits here?

A Yes.

Q And until that presumption is rebutted by [p. 2223] [sic] credible evidence which shows you beyond a reasonable doubt that he is guilty of the offense, you could still give him that presumption of innocence, would you not?

A Yes.

Q And we are also discussing at this point punishment, and the Code of Criminal Procedure mandates how a criminal trial may proceed. It tells us also that in this kind of case and this is the only time it can happen where a defendant cannot give up his right to have a jury assess his punishment if he is found guilty.

A That is right.

Q As relates to the special issues, special issue number one, I am sure we all said and we are going to say it again is a two prong issue. It has an A and B part.

One, whether it was deliberate and two on the other hand, there was a reasonable expectation that a death may occur. Would you be able to separate them, ma'am

and analyze them individually before answering special issue number one?

A In other words, could I see if he had or if the [p. 2226] person when he went in with the intention of committing a robbery, if he had intended to commit a murder as well at the same time, is that what you are asking me?

Q No, well not really. I'm asking you to separate one.

A Repeat it.

Q Whether he caused the death deliberately?

A Okay.

Q And two, whether there was a reasonable expectation on the part of the person that did the killing, that somebody might die?

A Okay.

Q At that time?

A Okay.

Q Could you do that?

A I believe I could.

Q Could you, ma'am envision a set of circumstances where someone might deliberately shoot someone and not have a reasonable expectation that that person might die?

A Yes, I think that is possible.

Q Okay, or would you possibly think that because a person went into a place with a gun that they had already

formed the intent to do what [p. 2227] they were going to do and if they had to use that gun, they would have already made up their mind that they were going to kill somebody?

A Well, I think that if they would take a weapon with them they might possibly have it in the back of their mind they may need to use it.

Q Now, with that feeling, would you still be able to be fair and impartial in determining whether the person had a reasonable expectation that somebody might die or would you automatically think that they had the gun and could possibly use it, that they knew?

A It would be – it would depend on circumstances around the using of the weapon.

Q Okay, you would look at all the circumstances in their totality before you made a decision?

A Right.

Q That is all we can ask you to do is to be fair to both sides, to look at it and that is what I think my question is couched in is whether you could be fair and open minded, and listen to the evidence and then make that determination, yourself, as to whether Part A or Part B or both should be answered yes, and [p. 2228] that is all I think we are asking you to do. Could you do that?

A I believe I could.

Q As relates to issue number two, ma'am, what kind of information would you like to have brought to you to help you make that determination?

A Whether or not it was predetermined that the gun was going to be used.

Q We are talking about issue number two whether the person would be a future threat to society?

A I think it would depend on past experiences.

Q In other words, I think you are saying –

A If it is a habitual thing that has occurred or reoccurred or if this is the first time.

Q But you would like to have, I think it would be a fair statement to say that you would like to have all the information that would be available to you before you made a decision?

A Right.

Q Now, the law is, the law doesn't say you cannot use that information from special issue number one to help you formulate your answers to special issue number two, but what [p. 2229] the law, what we are asking you is that because you found special issue number one to be answered yes and had found him guilty that – would you automatically find that that person will be a continuing threat to society?

A I think it would be based on his previous actions.

Q Is it – you would wait until you hear all the evidence before you made your decision?

A Yes.

Q Now, special issue number three, that goes to mitigation rather than justification. There is no justification as far as excusable justification under the law for the

taking of the life of another during a robbbery, but in this instance, you do get to look at not only the actions of the person who took the life, but the actions of the person who was ultimately killed to determine if the person who took the life acted reasonably in light of what the person that was killed was doing and toward that end, ma'am, I will give you an example, a person that may have been in his place of business, doing what he was supposed to do, minding his business, had a right to be [p. 2230] there, protecting his own property that he has worked for. Someone comes in to rob him. Well, he is tired, he is absolutely tired. He has been robbed several times before and he makes a reach, now we don't know exactly what he is reaching for, he doesn't have a gun up. We don't see a gun, but there is a sudden move and as a result of that sudden move the person who is attempting to rob him shoots him, thereby causing his death.

You may or may not find that provocation. My question is to you, ma'am, is this, could you conceive in your mind a set of facts or circumstances where the person who was there protecting his property did something in furtherance of the protection of his property as he has an absolute right to do, and as a result of what he does in protecting his property he is killed, would you, ma'am, also automatically find that killing to be unreasonable?

A I think it would depend on who was doing the shooting, if the person was absolutely scared to death, I think you would be more apt to shoot someone than someone who was more [p. 2231] experienced.

Q Okay. Yes ma'am, and in your answers – and I think that you are going exactly where I am going with

this is that you would not automatically find that the reaction to whatever the person did would accidentally cause his death, you would not find that reaction to automatically be unreasonable?

A I don't think so.

Q Well, I'm sorry, but I have to pin you down a little bit further than that?

A What you are asking me, I think is was – when the fellow who was protecting his property reached for whatever he was reaching for?

THE COURT: I will instruct you.

MR. MOCK: I'm not trying to lock into a situation.

A Or whatever there would be reason that the person who was coming in would think their life was in danger?

MR. MOCK: That would be something for you to conceive in your own mind. We are not trying to take you to a particular fact situation. My only question is to you could [p. 2232] you be open minded and –

A I think I would.

Q I can appreciate your attempt to be as fair as you can, and believe me, ma'am, I'm not trying to be argumentative, but I have to pin you down.

A To a yes or no?

Q If you can or couldn't

A Yes.

Q You could be open minded and fair and listen to the facts and then make up in your own mind as to determine what you might think is reasonable or unreasonable?

A Yes.

Q Before you made a decision?

A Yes.

Q Is there anything else that you might have, ma'am?

A Sir?

Q Is there any reason you might have whatever it may be that you could not be a fair and impartial juror and listen to the facts and evidence as presented in this case?

A Would you repeat that, sir?

Q Is there any reason whatever it may be that [p. 2233] you could not be a fair juror?

A No.

Q And listen to the facts and evidence presented in this case?

A No.

MR. MOCK: Your Honor, we will pass.

THE COURT: What says the State?

MR. HOBBS: The State would accept.

MR. MOCK: For purposes of the record we will accept also, if we had the opportunity.

THE COURT: Will you stand and be sworn as a juror in the case, please?

(At this time juror sworn.)

THE COURT: Ms. Gaylord, as I said, we anticipate we will begin Monday morning. We have one more juror that we must obtain prior to our beginning testimony, and whether or not we are able to get the person this afternoon or Monday, I'm not certain. Hopefully, we will be able to give you a phone call this afternoon or this weekend and let you know whether or not we are going to begin Monday morning. Deputy White down here is the individual who will be giving you a call, [p. 2234] either he or Deputy Pollinger, who are assigned to my Court. We have a work number and a home number for you where we can reach you at. Deputy White, before you leave, will give you a slip of paper with his name, Deputy Pollinger's name and the phone number for the Court, so if it is necessary for you to contact us in some way, you will be able to do so. So, if you need anything at this time, I guess not, since the trial is going to start Monday, I was going to tell you we would give you written verification for the people at the school district, so I can assume we can give that later.

JUROR: Do you think we will go past next week?

THE COURT: We don't know. We don't anticipate that.

JUROR: Okay.

THE COURT: Thank you, Ms. Gaylord.

[p. 2235] MR. MOCK: Your Honor, before the juror is brought in may we, for the record – Your Honor, we are most appreciative of the Court's indulgence in granting us an additional strike, however, we would note that we do have a jury of 12 veniremen that have now been empaneled to sit in judgment on this case. We would also needlessly remind the Court that we are now out of strikes. We would ask the Court in an effort of justice and fair play, Your Honor, in the alternate process, we have used our strikes in picking the original panel, we would ask for one strike for the pick of the alternatives.

THE COURT: That request is denied, Mr. Mock.

MR. MOCK: Thank you, Your Honor. Please note our exception to the Court's ruling.

THE COURT: May we have Ms. Faye Martin, please.

[p. 489] THE COURT: Please be seated ladies and gentlemen, I now read you the Court's charge.

(At this time Court reads the charge).

THE COURT: Mr. Hobbs, you may proceed.

MR. HOBBS: Your Honor, the State would respectfully waive the right to open and reserve the right to close, Your Honor.

THE COURT: Mr. Thornton, you may proceed, sir.

MR. THORNTON: If it please the Court, Mr. Hobbs, ladies and gentlemen of the jury. I would like to first take the opportunity to thank each and every one of you all for coming down and fulfilling your civic obligation to sit on the jury. I am sure you know this is a very difficult case we have to listen to. For me, it has been a very difficult situation. I am sure you have seen a lot of emotion and a lot of waiving on the forehand because in a sense, it has been very difficult decision we have to have made. At this time you ladies and gentlemen have to determine what is going to happen to [p.490] Gary Graham, whether he is going to get life in penitentiary or whether he should die. You have all heard the evidence from the witness stand concerning a number of things, a number of offenses state Gary Graham has been alleged to have been found to have committed. The fact remains we have a human life at stake. We have to make a decision on that human life. We have to make a decision on this young man, Gary Graham. What do we know about Gary Graham? One thing we know about Gary Graham is from May 13 through May 20th he reaped

havoc and hell on a lot of people. May 13, 14, 15, 16, 18 and 20th five days. Pure hell. What do we know about Gary Graham? We know that at age 3 he went to live with his Grandmother because his Mother was placed in a mental institution or placed herself in a mental institution. We know he lived on and off with his Grandmother and when she would come out of the hospital he would live with her and when she would go back he would go live with his Grandmother. Draw your own conclusions to that, what type of life he lived. You heard from his Step-father. He stated that Gary Graham would come to his house and visit [p. 491] his Mother every now and then. You heard from his Grandmother, that Gary Graham has 2 children of his own. I am sure all of you know this trial has been going on for 3 weeks. Some of you were asked questions the first day and some of you were asked questions a week or two after that. It's a long arduous process we have been through. The purpose of why we went through that process because our criminal justice system provides this with any individual who is accused of a crime, to be judged by his peers, by persons in society. Each and every one of you all. It's very difficult as ladies and gentlemen, to show compassion and consideration for an individual, apparently that didn't show any compassion for anybody else from May 13th through May 20th. It's a lot of compassion that should go out to the individuals in this case. Their lives have been changed and effected in a manner that would never be undone. Never. Degree of compassion and consideration should go to the parents of Gary Graham. Their lives have been changed to a point that can't be undone. What about Gary Graham? Will his life be changed? Certainly,

if you find him, that he should die, his life [p. 492] is definately going to change. Life in the penitentiary. The State will probably argue that this person isn't even – shouldn't even go to the penitentiary for life because if he gets in the penitentiary for life, he is going to commit crimes against other convicts of persons that work in the prison system. Well, I think it would be a bad commentary on our prison system if crime rate in the prison system is just as bad as it is out on the streets of Houston, Texas and all over the nation. Gary Graham is a young man. No doubt about it. Gary Graham has chosen a lifestyle, which to society, is not right. Nothing he did. Nothing he has been accused of is right, and cannot be condoned in society. You found him guilty of capital murder. The question is whether he should live or die. Gary Graham, in some sense, epitimous or what is wrong with our society. It is not to blame society. He epitimous what is wrong with society. A young man, hasn't even reached 20 years old. Not even 20 years old. He goes on a rage for 7 day, 7 days out of his life. He is not going to ever forget. You can believe it, 7 days out of the victim's life. They are [p. 493] never going to forget. I have thought long and hard about how I can ask you 12 people, who have listened to luminous amount of evidence against him, how can you ask 12 people for compassion, to show compassion for this individual. I ask myself that, but I would hope that it was something on the witness stand that you either heard that show some redeeming value. Something in Gary Graham's life to say that possibly he can be rehabilitated. Possibly. And I would urge each and every one of you all that there is a glimmer or a possibility that his life can change, given

that opportunity. You say how can you stand up here and ask somebody to give somebody the opportunity when he gave no one else the opportunity. It is a very hard decision to make. It is very hard for me to ask you to do that. Ms. Blackburn testified that after Gary Graham made her life miserable for 5 hours, he was lying on the bad naked asleep. She got his gun out of his hand and she said, "I took the bullets out and I thought about what I wanted to do or what I could do. I thought about shooting him." She had them right there. He was laying out on the bed. She had the gun in [p. 494] her hand and he was asleep. She said she couldn't do it. How could a lady who's been raped, who's been robbed, who's been humiliated, find compassion for that individual to the point that she couldn't take his life. How could she do it? How can you do it? It is something that has, the human being in all of us, I imagine, it is a very difficult thing for her to do. Gary Graham, 17 years old, went on a rage for 7 days. What did he do? He harrassed people. He stuck guns in their face. He shot an individual and he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days? Drugs? Alcohol? Maybe. Life? Maybe. Ladies and gentlemen, I only have a brief comment to make. After I'm finished, Mr. Mock will get an opportunity to talk with you. We have talked to each and every one of you all through voir dire, and we have asked each and every one of you questions and matters about your personal life, to find out what type of individuals you were, to be able to judge this person right here. Gary Graham. In some way, ladies and gentlemen, I would hope that you find some way, either in your heart based

on the [p. 495] evidence, find some compassion for that human being. I thank you.

THE COURT: Mr. Mock?

MR. MOCK: May it please the Court, Your Honor?

THE COURT: Yes, sir.

MR. MOCK: Honorable Judge Trevathan, Mr. Aduddell, and Mr. Hobbs, ladies and gentlemen of the jury, I, too would like to thank you for your attentiveness, not only throughout the guilt or innocence phase of the trial, but also during the punishment hearing. You returned a verdict based on an oath that you have taken that is still in effect, that you would render a verdict according to the law and the evidence as presented. I told you when I talked to you first that we would not quarrel with your verdict. The province of the jury is most sacred. I'm just appreciative of the fact that you weren't back there and discussed it, that you did what we asked you to do then. Look at the facts. Try the facts. You are also given a charge by the Court in this instance for punishment, and I don't know. I know you have all seen them before, but this is the law and this will be the [p. 496] only things you can take back with you, that will give you the answers, and each and every one of you individually talked with us about the three questions that you will have to answer. The State has put on a lot of evidence, a lot of what we call extraneous evidence, offenses for which Gary Graham is not on trial today, but they can do it in order to show you what they think is evidence, creditable evidence, to show that he will be a

continuing threat to society, that he will commit continuing criminal acts of violence. That in the end, the bottom line is this, ladies and gentlemen, see, it is couched in the special issue. It's easy to answer special issues, but we also talked with you about the bottom line, the cause and effect. Life or death. And that is simply what it means, and it can't be put any simpler. Whether you, ladies and gentlemen, believe beyond a reasonable doubt, based on all the evidence that you have heard, not only evidence which is on trial now, but other extraneous offenses for which he has is not on trial, and doesn't have to answer at this time, as to whether a man should live or die. See, because you found him guilty, we are past that [p. 497] phase now. The question now is what punishment for this crime, what punishment for this crime, the crime for which he has stand charged, and accused, charged and now convicted, for the death of Bobby Grand Lambert. Needless to say, there are many victims in this case, and I'm not going to take you on a guilt trip of being a member of society and place it at your fault for his actions. I'm certainly not willing to take the blame for his actions. I'm not going to ask his Mother, Grandmother and Father out here to take blame for his actions. There's only one person that is going to be punished. That young man. That young man. For what he has done. And you don't have to sit back and consider how long he should go to the penitentiary for. What we should do, because there are only two answers, and that is a choice. Life or death. Life in the penitentiary at the age of 18 years old. What is the meaning of punishment? Why do we punish. You wouldn't have the word punish if you didn't have the thought that there would be something forthcoming

from that punishment, not only for the person punished, but also for the people upon whom he inflicted some type of punishment. First, [p. 498] robbery. Sheer retribution. Make a person pay for what he has done. Make a person pay for the actions which they have committed by their own hand. Second reason, as a deterant [sic] to show others. We are going to show the others in Harris County, Texas, who have committed offenses that they shouldn't go out and do these things because we are going to kill Gary Graham. All ya'll folks out there who want to hijacked and happen to shoot somebody while you are jacking, all you folks that want to rob, rape and pillage stand up and take notice because we are going to kill Gary Graham. Don't do this anymore because you see what is going to happen to him? We are going to kill him. That and a quarter, maybe now a dollar, will get you a cup of coffee. If you think it is going to stop somebody who don't think about what he is doing in the first place, ladies and gentlemen, I purport to you that it won't. I purport to you that the death penalty is not a deterrant [sic] to crime. It is a punishment, maybe in an appropriate case, but it is not a deterrant [sic] to crime. You read the papers. You see what is happening. If we are looking for blame, if we are looking for scapegoats, they are [p. 499] easy to find, but we are not about that now. You are not going to go back there and do a psychiatric analysis of Gary Graham or the society in which he lives. Those are not the issues which you will have to answer. But you have to decide whether it's a deterrant [sic], whether taking his life, which will not bring back Bobby Grant Lambert, will not make any victims whole again. None of them will be whole again. It's nothing that can be

replaced. The first reason is rehabilitation, and you know when I think about that word, rehabilitation, it kind of makes you wonder, because before you can be rehabilitated, you have got to be rehabilitated. Where do you get a chance to rehabilitate somebody. Sure, they have some opportunities in the penitentiary, but the penitentiary, ladies and gentlemen, is strictly for warehouse commutes, for putting people away from society. Telling them that because of your actions, you will not be able to live among the rest of us. We do not condone nor will we tolerate your actions. We will put you over here where there are a lot of people just like you. Don't give you much of a chance to rehabilitate yourself. But you know, that [p. 500] society is better off because a person is away from society. See, you don't live in the penitentiary. You exist. So you think about one thing that is going to happen to everybody here except Gary Graham, regardless of what your decision. We are all leaving. Everyone here gets to leave but him. He either goes to live for life in the penitentiary or be prepared for death by injection, and when you look at a young man of his age, what do you think about? What do you think about the years when you think about death. You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where their [sic] going or what they want to do. Some of us are more fortunate. You also have to look at changes in society. Changes in ages. See, because what you are called upon to do is predict whether some time in the future Gary Graham would become a person fit to return to society. At least he is alive. See, when you are 17 to 20, you are young, hot-to-

trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and [p. 501] middle 30's, a change a little bit from you more radical stands to a more somewhat upright posture because you have had not only time to think, but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above. We get a lot of DWI's because we have to put up with society, but visually, ladies and gentlemen, criminal acts, because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live. I'm asking you, ladies and gentlemen, to give the man a chance to live, to exist, to exist, but the decision is yours, ladies and gentlemen. I'm asking you to give him a chance to live, but I'm asking you to go back there and look at the facts, look at the case, look at Gary Graham, because see, Mr. Hobbs is going to tell you that we protected his rights up to now. We have. Now is the time to look for the rights of society. Sure. I'm for law enforcement. Ladies and gentlemen, I'm for it. I'm for protecting your home, my home and my children and your children, but we still get back to a bottom line. The life or death of another human [p. 502] being. Compassion. Heart. This is one of those situations where you have to dig deep and think. Be very easy to go in there and say well, we don't have to worry about Gary Graham no more. We can just kill him and go on home. That is the easy way. The hard thing to do is what I'm asking you to do. Tear it apart. You don't know. You have know [sic] a little bit about Gary Graham, sure, but what his Grandmother told you, but you don't know that much about Gary Graham. You really don't. You know for

certain that during the week from May 13 to May 20th he was mean, see, you have a one week life span to deal with. A one week life span. You don't know that much about before that day. You don't know. You also don't know what caused it. See, the State doesn't have to show you [sic] motive, and I'm not trying circumvent or give them another burden because they don't have that burden to show you why. We don't have a burden to show you why and you don't know why. These are things that you have to speculate on, just like you have to speculate as to whether he will be a continuing threat to society. It is a burden I wouldn't want. It is a burden I would hate to assume, but see, by [p. 503] being able to live, ladies and gentlemen, in a society that we live in, with all the rights and privileges we enjoy, this is one of the relative duties we must assume. I appreciate you for doing it, but in no way, at no time, makes your task any easier because these are things you are going to have to live with. This is one of the toughest decisions you will have to make in your life, as to a person living or dying. Why help Gary Graham keeping him alive? Why help him? Well, if that is the way you feel, you are not listening to what I am saying anyway because he has got to be punished. He is going to be punished, not only here on earth, but he has to meet his God, also, whether he knows he has one or not. He will be punished by his Maker, also, because He knows what has happened. He knows whether all of these things the State brought you is true or not. You don't. I can believe you can believe but we don't know. We don't know what makes Gary Graham tick. I'm asking you, ladies and gentlemen, to look into your hearts, look deep into your hearts. I was – I was really amazed

somebody was asking me the other day about the witness and the deceased wife. Is the heart [p. 504] that big? Is you [sic] heart that big? I ask you for Gary Graham's life. Thank you, and God bless you.

THE COURT: Mr. Hobbs, you may proceed.

MR. HOBBS: Thank you, Your Honor. Gary Graham does have direction, and he has shown you that direction. He has shown you that direction in every way that you can possibly look at. And I stand before you now and I ask you on your oath as jurors to follow the law. And you, each of you, as individuals, as a group, represent the people, and there are certain individuals in our society that we have got to look at. And we have got to realize that are not fit to live with us. The evidence beyond a reasonable doubt shows that Gary Graham is not fit to live in this society, that he will constitute a continuing threat to society. Compassion? They ask for compassion. We ask you for his life. Compassion, in taking the life of Bobby Grant Lambert? Compassion in shooting Greg Jones? Compassion for Richard Carter? Compassion for Linda Jennings? Compassion for Mr. Salsgiver? Compassion for Ms. Blackburn. Not one ounce. Not one ounce. Your task is not [p. 505] an easy one. You, as individuals, must look at that, but all of us, each of us in our daily lives, in those few times when our lives must stand back and look at ours and ask ourselves what are we made of. What are we made of. Rights of the individuals of this society. The life of Bobby Grant Lambert. They say look at his youth. When does a human life taken the way he took that life of Bobby Grant Lambert cease to have meaning? It ceases to have meaning when the terror and the degradation of a man such as him holds that life

in his hand. Not by law. Not by the law of society. Not one ounce of that law of society. Not 12 people deciding the fate of an individual, but him alone. Compassion? Care? Have you just looked at him? Sure. Ms. Blackburn didn't kill him. Respect of the law. Respect to the law. Any – of any human being. Yes. Gary Graham has showed you a lot. And Gary Graham put himself exactly where he is at, and Gary Graham. Gary Graham. Not why, but what did he do. And you look at his motive, and you look at everything. Motive. We don't have to prove that. You look. You look at what he did. Your think about it. Care. Conduct. That caused the death of [p. 506] Bobby Grant Lambert. You can bury Bobby Grant Lambert in that parking lot in that concrete, in the degradation. Him and make his life meaningless. And the jury and the degradation and humility that he caused these people. You have that. Yes, look into yourselves. Death is the only protection that you, as the jury, and society can protect from people and especially Gary Graham. The seeds of our past are the harvest of the future and what seeds has Gary Graham planted? And where has he sowed those seeds? In the fertile earth? No. He buried Bobby Grant Lambert in the earth. His seeds are death. Pain. Suffering. Humiliation. Degradation. What do those things bring? But one thing tell you what Gary Graham is. You have seen his actions. You have heard from the mouths of these people. Deliberate conduct. Stop and think about what Ms. Skilern told you, and Mr. Grady, as an individual in his 50's is walking down from a store to a parking lot. Isn't it strange that he just loves parking lots. Approaches that individual an armed individual, an individual better than 30 years of age. For what. To rob. Deliberate act. He

brings that [p. 507] gun up and he grabs him, and what is Bobby Grant Lambert trying to do? He is trying to just get away. Doesn't swing at him. Just wants to get away. He comes up with that gun to his head. That tells you what Gary Graham thinks and is. Does he stop? No. He doesn't stop. And they ask you to let him continue. Society has a right to have Gary Graham stopped. Under the law, that last protection for those individuals of which Gary Graham is a prime example, and ever after Ms. Skilern draws his attention to her and they are spread apart and what, if anything, is Bobby Grant Lambert doing? Nothing. And what is Gary Graham doing? He takes death in his hand. Arm extended. Shoots and kills Bobby Grant Lambert. Why? For no reason. Reasonable expectation of death. Within 3 or 4 feet of each other. Arm extended to his chest, and a bullet through his heart. Reasonable. Compassion? Why not justice. Why not revenge. Justice under the law. The death of Gary Graham. Whether the conduct was reasonable in response to any provocation by Bobby Grant Lambert. What provocation? Trying to get away, and an unarmed 50 year old man trying to get away from a young killer. Backing [p. 508] away. No threat. No harm. Nothing to Gary Graham. And that life is gone. The law is all that we, as a society, have to protect the weak among us, and to take away those individuals and capital punishment is for that extreme case. To take away, to take away those individuals that, by their very actions, by the reasonable expectation and the probability of their continuing acts of criminal violence, will damage society. Your task. No, I'm not going to tell you that it's easy. But under the evidence and beyond a reasonable doubt it is the only proper

verdict. Yes, special issue number one. Yes, to special issue number two. Yes, to special issue number three. Beyond a reasonable doubt. The life of Bobby Grant Lambert. The terror of this woman. The humiliation, degradation, the life that he almost snuffed out here. The people he scared here. And as he knelt with that shotgun to his head, was he thinking compassion? He was thinking of doing, not by law, not by any consideration of the law, but the lawleness [sic] and the terror of Gary Graham. Gary Graham. He made no differentiation in those. Stop and think. His Grandmother is roughly the same age as Ms. [p. 509] Blackburn that he raped and robbed and he degraded. And Mr. Salsgiver. Their rights. Their rights to be free, to walk from their job to their car without fear of getting – while working on your job and going home, each of you work. Each of these people are working to better themselves. And yes, Gary Graham is working. He is working. He is using that terror and death and mutilation on your street. The streets of your community. On the parking lots and parking garages of your community. Task under the law. Under the evidence in your oath as a juror. Each and every witness is there. Beyond a reasonable doubt. I submit to you it's way beyond a reasonable doubt. Sawed-off shotgun to kneeling ladies. Ladies and gentlemen of the jury, caliber of the weapons. Sawed-off shotgun. Shot off in lots. Stuck in faces. Both up in the teeth and like behind the head as they begin to scream, and as you heard her say and what he was doing. Compassion? Did he give compassion to any of these folks. The law is the last protection of society. He preys upon those he can, and every one that he can. I submit to you that Gary Graham, by his actions, by his conduct, that the

probability [p. 510] based upon what you have seen demonstrated by his very conduct. Yes, as to special issue number one. Yes, as to special issue number two. And yes, to special issue number three, and the death of Gary Graham. Thank you.

THE COURT: Ladies and gentlemen, you may retire to deliberate upon your verdict. The Court will be in recess to await the jury's verdict.

(At this time jury deliberated on their verdict).

THE COURT: Both sides ready for the jury?

MR. HOBBS: Yes, Your Honor.

MR. MOCK: Yes, Your Honor.

THE COURT: Please seat the jury, Mr. Pollinger.

(At this time jury put in jury box).

THE COURT: Please be seated. Please be seated. Mr. Bradley, has the jury reached a verdict?

FOREMAN: Yes, Your Honor, we have.

THE COURT: Would you hand it to the Bailiff, please.

The jury verdict in Cause 335,378,

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
TEXAS HOUSTON DIVISION

GARY GRAHAM, Petitioner, V. JAMES A. LYNAUGH, Director, Texas Department of Corrections, Respondent.	))))))))	CIVIL ACTION NO. H-88-563

MEMORANDUM ON THE DENIAL OF A STAY OF EXECUTION AND WRIT OF HABEAS CORPUS

1. Statement

Gary Graham is sentenced to die by injection before sunrise tomorrow, February 25, 1988, and has applied for a writ of habeas corpus and moved to stay his execution. In addition to the pleadings and exhibits filed in this Court, the Court has had before it for its consideration prior to the issuance of this Memorandum and Order the entire 20-volume transcript of the state court proceedings, the transcript of the state court habeas corpus evidentiary hearing held on January 8, 1988, the findings of fact and conclusions of law of the state court, and the opinions of the Texas Court of Criminal Appeals relevant to this case. Both the writ of habeas corpus and stay of execution are denied.

2. Background

Graham was convicted of capital murder and sentenced to death for the shooting death of Bobby Grant Lambert during a robbery in a Houston grocery store parking lot in 1981. Both guilt and penalty phases of the trial were to tried to a jury.

Before filing this federal action, Graham has pursued a direct appeal to the Texas Court of Criminal Appeals. The conviction was affirmed in an unpublished per curiam opinion. *Graham v. State*, No. 68,916 (June 12, 1984).

On July 13, 1987, Graham filed his application for a writ of habeas corpus in the state trial court pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon Supp. 1987-88). The trial court conducted an evidentiary hearing on January 8, 1988. On February 9, 1988, the state district court entered findings of fact and conclusions of law recommending relief be denied, and ordered the record transferred to the Texas Court of Criminal Appeals.

The Texas Court of Criminal Appeals denied relief on February 19, 1988.

3. The Standard for Issuance of a Stay of Execution

The petitioner must show that there is a question of some substance or that there is a substantial showing of the denial of a federal right. He need not show that he will prevail on the merits; he need only show that the issues are debatable among jurists of reason, that a court could resolve the issues differently, or that the questions are adequate to deserve to proceed further.

4. Evidentiary Hearing

In a habeas proceeding, "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." *Townsend v. Sain*, 372 U.S. 293, 312-313 (1963). This Court finds that the state court has afforded Graham a full and fair hearing and that all material facts have been developed. Therefore, this Court finds that an independent evidentiary hearing is not required.

Further, pursuant to 28 U.S.C. § 2254(d), factual findings of the state court must be presumed to be correct unless the Petitioner can establish by convincing evidence that those findings are erroneous. *Sumner v. Mata*, 449 U.S. 539 (1981). This Court finds that Graham has not shown by convincing evidence that the factual findings made by the state court are incorrect.

5. Imposition of Death Penalty on Defendant, Age Seventeen at the Time of the Offense

Graham contends that his death sentence is cruel and unusual punishment under the eighth amendment to the United States Constitution because he was 17 years of age at the time he committed the offense for which he has been sentenced to death. The Fifth Circuit has held that nothing in society's standards of decency compel more than *consideration* of youth as a mitigating factor. *Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir. 1984) (imposition of the death penalty on a youth, seventeen years old at the time of the offense). This Court finds *Prejean* controlling in this case.

Further, this Court finds the case of *Thompson v. Oklahoma*, United States Supreme Court No. 86-6169, cited by Graham, not on point, because of the difference in ages of the defendants. *Thompson* was argued before the United States Supreme Court on November 9, 1987, on the issue of whether sentencing a defendant to death, who was 15 years old at the time of the offense, constitutes cruel and/or unusual punishment. *See Thompson v. State*, 724 P.2d 780 (Okla. Crim. App. 1986), *cert. granted*, ___ U.S. ___, 107 S. Ct. 1284 (1987). As previously stated, the Petitioner was 17 years of age at the date of the incident in question.

6. Unconstitutionality of the Texas Death Penalty Statute

Graham asserts that he was convicted under an invalid Texas death penalty statute, Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987-88), because jury question number two during the penalty phase of trial improperly "precluded the jury in Petitioner's case from considering various types of mitigating evidence." The United States Supreme Court has recently reaffirmed that the Texas death penalty statute permits "the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator." *Lowenfield v. Phelps*, 56 U.S.L.W. 4071, 4075 (U.S. Jan. 13, 1988) (citing *Jurek v. Texas*, 428 U.S. 262, 271-274 (1976)). Therefore, this Court finds Graham's argument is without merit.

Graham also claims that the Texas statute is unconstitutional in that it "rendered trial counsel legally ineffective by forcing him to fail to present relevant mitigating evidence." Graham references the Court to

Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987). Additionally, Graham urges that the statute's failure to define mitigating circumstances renders Graham's conviction unconstitutional, citing *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987), *cert. granted*, 46 U.S.L.W. 3287 (U.S. Oct. 9, 1987).

As *Jurek* expressly held that the Texas statute is constitutional, this Court also so holds. This Court has also considered Graham's argument regarding the trial court's failure to instruct the jury regarding mitigating circumstances due to the state district court's factual finding that defense counsel failed to object, but finds that Graham has not demonstrated that the charge as a whole was so clearly erroneous as to result in a grave miscarriage of justice. *United States v. Varkonyi*, 645 F.2d 453, 460 (5th Cir. 1981) (citing *United States v. Franklin*, 586 F.2d 560, 569 (5th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979)).

7. Petitioner's Present Competency to be Executed

Graham's fourth claim is that he is not competent to be executed under the standard set forth in *Ford v. Wainwright*, ___ U.S. ___, 106 S. Ct. 2595 (1986).

Although Graham attached psychiatric reports to his petition which were dated June and July, 1986, the most recent evaluation of Graham's competency occurred on August 25, 1987. Dr. Jerome B. Brown found that Graham exhibited "no credible signs of severe psychiatric disturbance or psychological impairment that seems genuine." After the evidentiary hearing on January 8, 1988, the state district court found that there was "no credible evidence

from any source to indicate that [Graham] is not competent to be executed."

This Court finds that Graham has failed to make a showing that he is not competent to be executed.

8. Ineffective Assistance of Counsel

Graham suggests that he was denied effective assistance of counsel at the trial because of numerous alleged shortcoming [sic] of defense counsel.

A two-prong test for determining ineffective assistance of counsel has been established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). First, Petitioner must show that counsel's performance was deficient which requires "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 680. Second, Petitioner must show that the deficient performance prejudiced his defense such that he was deprived of a fair trial. *Id.* Further, competency of representation is not to be judged by hindsight or by facts unknown at the time of trial. *Id.*

Graham alleges twelve separate assertions of purported errors or omissions by his trial counsel team.

A. Graham alleges that counsel failed to conduct an adequate pretrial investigation of the case by failing to interview all of the witnesses and all possible mitigation witnesses. The state district court found that Graham did not furnish counsel with the names or addresses of the potential alibi witnesses. This Court finds that counsel's

actions were reasonable [sic] based on the information supplied them by Graham at the time.

B. Graham asserts that counsel failed to obtain an independent psychological-psychiatric examination for purposes of mitigation. Defense counsel were not ineffective for failing to request a third psychological evaluation of Graham as both doctors who had previously examined him reached similar conclusions declaring him both sane and competent. *See Beans v. Black*, 757 F.2d 933, 936 (8th Cir. 1985) (defense counsel's failure to obtain second opinion regarding defendant's competency was not unreasonable under *Strickland*).

C. Graham claims that counsel Ron Mock knew personally the State's key witness and failed to disclose this personal relationship to Graham. The state district court made the factual finding that Ron Mock did not have any personal relationship with the State's eyewitness, Bernadine Skillern, and that there was no credible evidence to believe that Ron Mock had a conflict-of-interest with his client. This Court finds that Graham has not demonstrated that an actual conflict of interest arose. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (citing *Glasser v. United States*, 315 U.S. 75-76 (1942)) (a defendant who raised no objection at trial must demonstrate that an actual conflict of interest affected his attorney's performance).

D. Graham also asserts that defense counsel was made aware of at least four witnesses who could testify as alibi witnesses. The state district court found that the names and addresses of the four potential alibi witnesses were never given to counsel. This Court has examined the

affidavit of counsel attached to the transcript of the evidentiary hearing held January 8, 1988, and also finds that counsel did not fail to investigate or produce witnesses of which he was informed. This Court finds no indication of ineffective assistance in counsel's actions.

The Court has also considered Graham's additional allegations of ineffective assistance of counsel: "counsel knowingly allowed the petitioner to be tried in the same clothes that he was wearing on the date of his arrest"; "counsel refused to allow the petitioner to testify in his own behalf at the guilt-innocence phase or at the punishment phase"; "petitioner's counsel totally failed to develop a proper trial strategy"; "petitioner's counsel totally failed to request a limiting instruction at the punishment phase of the trial concerning the extraneous offenses which were introduced into evidence"; "petitioner's counsel only called two witnesses to testify in mitigation of the petitioner's punishment"; "petitioner's court-appointed counsel failed to call . . . four witnesses [who] were with the petitioner on the alleged date of the offense"; and "Attorney Mock '*discovered from listening to testimony* that one of the robberies committed by Graham took place within a few yards of Mock's house in southeast Houston' according to Houston Chronicle reporter Alan Bernstein." The Court, based upon an examination of the record, finds that all of these allegations of Petitioner are without merit.

9. Unconstitutionality of the Texas Death Penalty Statute

Claim VI of Graham's petition asserts additional grounds for the unconstitutionality of the Texas death

penalty statute: (1) lack of "sentence review," (2) lack of comparing death sentences on a state-wide basis resulting in disparity of punishments, (3) lack of trifurcated system, (4) lack of informing the jurors of the result of their answers to the special issues, and (5) admissibility of unadjudicated offenses.

As stated above, this Court finds *Jurek*, 428 U.S. at 262, controlling and finds the Texas death penalty statute constitutional.

10. Exclusion of Jurors

Graham is a black male who was under eighteen years of age at the time of the commission of the offense. Graham urges that (1) blacks were systematically excluded from the jury panel pursuant to *Witherspoon;* (2) the Grand Jury was substantially under-represented by blacks and all individuals under 18 were excluded from service; (3) the trial jury was substantially under-represented by blacks and all individuals under 18 were excluded from jury service; and (4) the district attorney prevented the jury from being representative of blacks by his use of challenges for cause and peremptory challenges.

Graham has failed to prove that pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968), blacks were systematically excluded from the jury panel by challenges for cause because allegedly a larger percentage of blacks are against the death penalty.

Graham has also failed to show that the grand jury and the trial jury was under-represented by blacks for

any reason. Mere conclusory allegations in an application for federal habeas relief fail to rise to a prima facie showing of discrimination and fail to trigger *Batson v. Kentucky. Esquivel v. McCotter,* 791 F.2d 350, 351 (5th Cir. 1986) (referencing *Batson v. Kentucky,* ___ U.S. ___, 106 S. Ct. 1712, 1722-1723 (1986)); *see also McClenskey v. Kemp,* ___ U.S. ___, 107 S. Ct. 1756, 1766 (1987) (equal protection violation requires showing that decision makers acted with "discriminatory purpose").

Graham has also not shown that the exclusion of all individuals under the age of 18 violated his right to a fair and impartial trial.

SIGNED at 7:10 p.m. on February 24, 1988, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
TEXAS HOUSTON DIVISION

GARY GRAHAM, Petitioner, V. JAMES A. LYNAUGH, Director, Texas Department of Corrections, Respondent.	)	CIVIL ACTION NO. H-88-563

ORDER DENYING STAY OF EXECUTION, WRIT OF HABEAS CORPUS, AND CERTIFICATE OF PROBABLE CAUSE FOR AN APPEAL

1. Gary Graham's motion to stay the execution of the death sentence of the 182nd District Court of Texas is denied.

2. Gary Graham's application dated February 23, 1985, for a writ of habeas corpus is denied.

3. Gary Graham's motion for a certificate of probable cause for an appeal is denied.

SIGNED at 7:10 p.m. on February 24, 1988, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
United States District Judge

Gary GRAHAM, Petitioner-Appellant,

v.

James LYNAUGH, Director, Texas Department of Corrections, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals,
Fifth Circuit.

Aug. 31, 1988.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, KING and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Gary Graham, seven years after his conviction in the Texas state courts for capital murder, is before us for the first time and petitions this court for a certificate of probable cause, seeking a stay of his execution and habeas relief under 28 U.S.C. § 2254. We granted a temporary stay of his execution, received briefs, and heard argument so that we could consider his petition more closely. After a thorough review, we are convinced that Graham's contentions are meritless and that he has failed to make any showing of the denial of a federal right. We therefore deny Graham's petition for certificate of probable cause. Nevertheless, in order that the Supreme Court may have an opportunity to consider this case, the

temporary stay will not be lifted until 12:01 a.m., September 30, 1988.[1]

I

This habeas corpus petition arises from Graham's conviction in 1981 in Texas state court for the felony offense of capital murder. Graham, who was seventeen at the time of the crime, was represented by two attorneys who developed a defense around mistaken identity. Counsel advised Graham against testifying, and he followed this advice. No alibi witnesses were called, and only two mitigation witnesses testified during the sentencing phase. Graham was found guilty and sentenced to death.

Graham appealed his conviction to the Texas Court of Criminal Appeals. He argued that the trial court improperly excluded five prospective jurors and denied a limiting instruction regarding extraneous offenses. On June 12, 1984, in an unpublished per curiam opinion, the court of criminal appeals affirmed the conviction. it was not until June 26, 1987, however, that the trial court set the execution date. Execution was set for July 30, 1987.

Graham then began these efforts for postconviction relief when he petitioned the Texas state district court. Because the petition was not filed until July 13, 1987, less than three weeks before the scheduled date, execution was postponed to allow time for judicial review. After the

[1] Cases are pending that may have related issues. *See* notes 2 and 8 *infra*.

district court conducted an evidentiary hearing on January 8, 1988, the court entered findings of fact and conclusions of law recommending denial of relief. The Texas Court of Criminal Appeals then denied relief on February 19, 1988. Graham's execution was then rescheduled for Februry 25.

Graham filed this petition for a writ of habeas corpus and stay of execution in federal district court on February 23, 1988. The district court found that all relevant facts had been developed by the state court and adopted the state court's factual findings. *See Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). After reviewing Graham's legal contentions, the district court, on the eve of Graham's scheduled execution, determined that his claims were meritless, denied relief and denied a certificate of probable cause.

Graham immediately appealed and asked this court to grant his petition for a certificate of probable cause. We issued an order temporarily staying Graham's execution so that we might have more time to examine his request. *See e.g., Henry v. Wainwright*, 743 F.2d 761, 762 (11th Cir. 1984). After submission of briefs and oral argument, we now address the questions before us.

II

The standard for granting a certificate of probable cause "requires petitioner to make a 'substantial showing of the denial of [a] federal right.' " *Barefoot v. Estelle*, 463 U.S. 880 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983) (quoting *Stewart v. Beto*, 454 F.2d 268, 270, n.2 (5th Cir.

1971), *cert. denied*, 406 U.S. 925, 92 S.Ct. 1796, 32 L.Ed.2d 126 (1972)). In the light of this test, we turn to the issues before us.

A.

First, Graham asserts that his death sentence violates the eighth amendment because he was seventeen at the time of the offense. Graham contends that, despite Texas state court and Fifth Circuit precedent to the contrary, this issue is meritorious because recently the Supreme Court has called into serious question the application of the death penalty to teenagers. *Thompson v. Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988) (plurality opinion). Upon reviewing the *Thompson* decision, we find that it offers Graham no help. In a plurality opinion, Justice Stevens concluded that the eighth amendment prohibits the execution of an individual who is under sixteen years of age at the time the crime was committed. *Id.* at ___, 108 S.Ct. at 2700. Justice Stevens based the decision upon what he considered to be the current "evolving standards of decency." *Id.* at ___, 108 S.Ct. at 2691. The opinion examined the capital punishment policies of all the states and found a consensus that imposition of capital punishment upon someone who is under sixteen years of age is "now generally abhorrent to the conscience of the community." *Id.* at ___, 108 S.Ct. at 2697.

Justice O'Connor, although concurring in the judgment, declined to find expressly that a national consensus existed that prohibited the execution of anyone under the age of sixteen. *Id.* at ___, 108 S.Ct. at 2704-05. Hence she concluded only that "petitioner and others who were

below the age of sixteen at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." *Id.* at ___, 108 S.Ct. at 2711.

Neither Justice Stevens' nor Justice O'Connor's opinion bears any suggestion that an individual of Graham's age cannot be sentenced to death. The evidence relied on in *Thompson* simply reflected a likely consensus among the states that execution of an individual *under the age of sixteen* was cruel and unusual punishment. Neither the holding nor the rationale of *Thompson* supports an argument that the eighth amendment bars the death penalty against persons who are sixteen or older. *See* ___ U.S. at ___ - ___, 108 S.Ct. at 2691-96. Thus, *Thompson* does not aid Graham.

Graham fairs no better under Fifth Circuit precedent. This court has specifically observed that "[n]o court has ruled that in all cases and under all circumstances, the execution of those who commit capital offenses while under the age of eighteen constitutes cruel and unusual punishment." *Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir. 1984). Texas state law has similarly held that the capital sentencing of an individual who is less than eighteen years old is not unconstitutional. *Cannon v. State*, 691 S.W.2d 664, 678 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986); *Ferguson v. State*, 573 S.W.2d 516, 525 (Tex. Crim.App. 1978), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2870, 61 L.Ed.2d 304 (1979). There are no special circumstances in Graham's case that indicate that he should be treated any differently from any other seventeen-year-old person who commits the

crime of capital murder. We therefore must conclude that Graham's first contention has no constitutional basis.[2]

B.

Graham challenges the Texas death penalty statute, Tex. Code Crim.Proc.Ann. Art. 37.01 (Vernon 1981 & Supp.1987). Under the fifth, sixth, eighth and fourteenth amendments of the United States Constitution and corresponding Texas provisions. He objects to the statutory sentencing procedure that determines punishment by allowing the jury only to answer specific questions.[3] Tex.Crim.Pro.Code Ann. art. 37.071(b) (Vernon 1981 & Supp.1987). Under the Texas scheme, only two special

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[2] We are cognizant of the Supreme Court's grant of certiorari in *High v. Kemp*, 819 F.2d 988 (11th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). *High* deals specifically with the imposition of the death penalty on a seventeen-year-old defendant. This panel, however, is bound by Fifth Circuit precedent which holds that the execution of a defendant who was aged seventeen when the crime was committed does not constitute cruel and unusual punishment. *See Prejean v. Blackburn*, 743 F.2d 1091, 1098 (5th Cir. 1984).

[3] He further contends that the statute does not define "mitigating circumstances" and that the trial court failed to instruct the jury on the proper treatment of mitigating circumstances. These contentions are meritless in the light of Supreme Court and Fifth Circuit decisions upholding the constitutionality of the Texas sentencing scheme. *See e.g. Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir. 1986).

issues were submitted to the jury: (1) whether the crime was committed deliberately, and (2) whether the defendant is likely to pose a future danger to society. Graham alleges that these questions do not permit the jury to weigh mitigating circumstances when formulating their answers.[4]

Graham's attack upon the Texas statutory sentencing scheme raises issues that are similar to those contained in *Franklin v. Lynaugh*, which, at the time we granted a temporary stay, was pending before the Supreme Court, 823 F.2d 98 (5th Cir.), *cert. granted*, ___ U.S. ___, 108 S.Ct. 221, 98 L.Ed.2d 180 (1987). The Court granted certiorari on the issue of "[w]hether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme." The *Franklin* petitioner had requested five jury instructions that would have informed the jury that they should consider all mitigating evidence in answering the Texas statutory questions. ___ U.S. ___, ___, ___, 108 S.Ct. 2320, 2324, 2325, 101 L.Ed.2d 155 (1988). The requested instructions further stated that the jury could answer the statutory questions in the negative if they found any evidence mitigating against the death penalty. ___ U.S. at ___, ___, 108 S.Ct. at 2324, 2325. The trial court refused these special jury instructions and Franklin asserted that because the Texas sentencing scheme did not allow the jury to consider the full range

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[4] These mitigating factors introduced at the sentencing phase, included Graham's youth and his difficult childhood.

of the mitigating evidence, his eighth amendment rights were violated. *Id.*[5]

On June 22, 1988, the court issued its plurality opinion upholding the Texas statute. *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion). Writing for the plurality, Justice White concluded that the trial court did not violate the eighth amendment by refusing to grant Franklin's requested instructions. ___ U.S. at ___, 108 S.Ct. at 2331-32. He based this holding on the conclusion that the Texas statutory questions did not prevent the *Franklin* jury from considering mitigating evidence. He stated: "It is the established Texas practice to permit jury consideration of '"whatever mitigating circumstances" the defendant might be able to show' in capital sentencing. . . . " *Id.* at ___, 108 S.Ct. at 2326. He further noted that Franklin was allowed to present, and the jury allowed to consider, the only mitigating evidence offered, i.e., his good prison disciplinary record. *Id.* at ___, 108 S.Ct. at 2328. Indeed, this particular mitigating circumstance could be considered specifically in response to the Special Issues before the jury because it related to the statutory question of future dangerousness. *Id.* in short, the plurality opinion expressly reaffirmed *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and thus appears to uphold the Texas statute against any argument that it limits

[5] The issue of whether the jury can consider "residual doubt" as a mitigating factor was also before the Court in *Franklin*. ___ U.S. ___, 108 S.Ct. 2320. Graham, however, does not raise this issue and we do not address it.

consideration of relevant mitigating evidence.[6] *Id.* ___ U.S. at ___, 108 S.Ct. at 2331.

Justice O'Connor, although concurring in the judgment of the court, wrote separately, joined by Justice Blackmun. Justice O'Connor's opinion took exception to Justice White's suggestion that a state may limit the sentencing authority's ability to consider mitigating evidence. *Id.* at ___, 108 S.Ct. at 2332. She noted that the Court in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion), held that the state could not prevent the jury "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." She emphasized her view that a jury's sentencing decision "should reflect a reasoned *moral* response to the defendant's background, character, and crime," *id.* ___ U.S. at ___, 108 S.Ct. at 2333 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, Jr., concurring) (emphasis in original)), and concluded that a state cannot prevent the jury from considering the full scope of relevant evidence that might mitigate the defendant's culpability for the crime. Justice O'Connor reconciled her broader view with the judgment in *Franklin* by noting that the only mitigating evidence introduced by Franklin was that he had a good prison disciplinary record. Since the jury could consider this mitigating evidence in answering the Special Interrogatory concerning future dangerousness,

[6] We do note, however, that the conclusion of the opinion might be interpreted to limit its holding to the facts in Franklin's case. *See Franklin*, ___ U.S. at ___, 108 S.Ct. at 2325.

Justice O'Connor upheld the Texas sentencing scheme as it applied to Franklin. *Id.*

In relating *Franklin* to the instant case, we first note that the plurality opinion, and thus the judgment of the Court, clearly upheld the Texas sentencing scheme. Second, we observe, however, that the evidence relative to mitigation in this case is more similar to *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert, granted*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), than to *Franklin*. There were two mitigating points made to the jury here: (1) Graham was seventeen-years old at the time the crime was committed and (2) he had a difficult family life. Thus, the concerns about the Texas sentencing scheme expressed by Justice O'Connor, that the jury may be prevented from considering the full range of the mitigating evidence as it relates to the defendant's moral cuplabiity, could be directly at issue in this case.

We hold, nevertheless, that the jury's verdict in *Graham* is consistent with the constitutional requirements outlined in *Franklin* and other precedents. Indeed, we are convinced that the plurality opinion in *Franklin* only strengthens past circuit and Supreme Court decisions that indicate that Graham cannot prevail upon his eighth amendment challenge. For instance, *Franklin* reaffirmed *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976), which expressly held the Texas death penalty statute constitutional. *Franklin*, ___ U.S. at ___, ___, 108 S.Ct. at 2325, 2328. The plurality opinion cited with approval *Lockett v. Ohio*, 438 U.S. 586 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which noted that the Texas statute does allow the jury fully to consider relevant mitigating

circumstances.[7] Following these guidelines, this circuit, upon numerous occasions, has concluded that the Texas statute does allow consideration of mitigating evidence, and that the statute is constitutional. *Selvage v. Lynaugh*, 842 F.2d 89, 94 (5th Cir. 1988); *Williams v. Lynaugh*, 837 F.2d 1294 (5th Cir. 1988), *cert. granted*, ___ U.S. ___, 108 S.Ct. 1000, 98 L.Ed.2d 967 (1988); *Riles v. McCotter*, 799 F.2d 947, 952-53 (5th Cir. 1986).[8] We conclude, therefore, that Graham's arguments on these grounds are meritless.[9]

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[7] Graham also contends that the jury should be informed of the effect of their answers to the sentencing questions. The state court found that the jury *did* advise the jurors of the consequences of their answers and the record supports this finding.

[8] We do not suggest that this area of the law is devoid of wrinkles. The Supreme Court has recently granted certiorari in the case of *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). In *Penry*, our court closely scrutinized evidence of Penry's mental retardation and concluded that there was some doubt whether the Texas statute permitted this evidence to be considered in answering the sentencing questions. 832 F.2d at 925.

[9] Graham also argues that the Texas statute is unconstitutional because testimony concerning unadjudicated extraneous offenses was allowed during the punishment phase of the trial. In *Williams v. Lynaugh*, 814 F.2d 205 (5th Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987), this court rejected a similar argument and concluded that "admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the eighth and fourteenth amendments." 814 F.2d at 208. We stand by this decision.

C.

Graham next argues that even if the Texas statute is constitutional, his trial attorney was rendered ineffective because the attorney construed the statute as precluding the consideration of mitigating factors. As indicated by the affidavit of Graham's trial attorney, the attorney was not in any way discouraged by the statute from presenting mitigating evidence of Graham's psychiatric treatment; rather, his decision not to pursue this course resulted from his belief that little convincing evidence existed and that damaging rebuttal evidence would be introduced.[10] The attorney's concern was justified because, as the Supreme Court has noted in *Buchanan v. Kentucky*, ___ U.S. ___, 107 S.Ct. 2906, 2917-18, 97 L.Ed.2d 336 (1987), "if a defendant . . . presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant released." Finally, during the sentencing phase, Graham's attorney did obtain mitigating testimony from Graham's stepfather and grandmother concerning his childhood. The evidence reflects no other witnesses who could or would present relevant evidence on Graham's behalf. Graham's present contention that his trial attorney was ineffective because he introduced little mitigating evidence is therefore meritless.

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[10] Graham's attorney believed that the prosecution's witnesses would testify that Graham was "faking" his mental problems, that he was manipulative of others, and that he had told them it was "O.K. to rob people."

D.

In Graham's fourth contention, he alleges that he is not presently competent to be executed. Graham relies on post-trial reports filed by psychiatrists Dorothy Lewis and Johnathan Pincus and contends that there is evidence of considerable organic impairment, moderate retardation, and psychotic symptoms.

The state court, in examining these contentions, noted that Graham was examined by two psychiatrists at the time of trial and was adjudged competent to stand trial. In reaching its decision that Graham was competent both at trial and presently, the state district court stated that it

> carefully considered (1) all the psychiatric material submitted by both the applicant and the respondent, and (2) the applicant's demeanor and abilities as he testified at the evidentiary hearing held January 8, 1988. While the reports from Dr. Dorothy Otnow Lewis and Dr. Jonathan H. Pincus suggest that the applicant is mildly brain damaged, of low intelligence, and has experienced 'bipolar mood disorders,' there is nothing in the reports or evidence from any other source to indicate that the applicant is either insane or that he does not know the fact of his impending execution and the reason for it.

Moreover, the state court found that Graham was examined by Dr. Jerome Brown in January 1987 and found competent to participate in the habeas evidentiary hearing and assist his attorney. Thus the state court held that there was "no credible evidence from any source to indicate that the applicant is not competent to be executed."

Under *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981), the state court's findings must be given a presumption of correctness unless one of the conditions provided in section 2254(d) is established. *See also Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The most relevant consideration listed in section 2254(d) is whether the trial court's factual findings are "fairly supported by the record." Clearly, there is competent evidence supporting the state court's finding that Graham is competent to be executed; indeed, the petitioner cannot seriously argue that there is not. We therefore hold that Graham's contention is meritless.

E.

Graham's fifth contention is that he was denied his right to effective assistance of counsel in violation of his fourth, sixth and fourteenth amendment rights. Graham's particularized grounds are that his counsel:

(1) failed to conduct an adequate pretrial investigation,

(2) failed to interview all the witnesses,

(3) failed to obtain a third psychological-psychiatric examination,

(4) failed to conduct an adequate cross-examination of the state's key witness,

(5) failed to bring forth proper alibi witnesses,

(6) failed to request a limiting instruction concerning extraneous offenses,

(7) failed to develop a proper trial strategy,

(8) failed to provide proper clothing for the petitioner during trial,

(9) failed to call more than two witnesses during the punishment phase of Graham's trial,

(10) failed properly to investigate the alleged extraneous offenses admitted into evidence against Graham,

(11) failed to order an independent psychiatric examination of Graham, and

(12) failed to allow Graham to testify at the guilt/innocence phase or the punishment phase of the trial.

The affidavit submitted by Graham's original defense counsel has a particular bearing on these assertions. The state court credited Graham's trial counsel and determined that Graham's counsel had conducted himself in a competent manner. For example, the state court's factual findings show that graham's counsel met with Graham on numerous occasions to discuss the case with him. Graham stated only that he did not commit the crime and did not inform his attorney of any witnesses who would support his contention or explain where Graham had been at the time the crime occurred. The state court specifically determined that the alibi witnesses upon whom Graham now relies were never available to Graham's trial attorney. Moreover, the court found that three of the four alleged alibi witnesses did not offer credible testimony.[11] The defense counsel also hired an

[11] The witnesses submitted a written affidavit over five years after Graham's conviction for capital murder. One witness testified that the affidavit was prepared by a third party and the witnesses only signed the statement.

investigator to interview possible witnesses, and filed a motion for sanity and competency evaluation. It was further found that counsel had valid reasons for failing to request a third independent psychiatric evaluation of Graham.[12] Counsel also used his personal funds to buy Graham suitable clothing for the trial. Counsel further attempted to obtain numerous mitigation witnesses, but only two would agree to testify favorably for Graham. Credited testimony showed that counsel advised graham that he had the right to testify but counsel's legal view was that Graham would not present himself as a sympathetic witness. Furthermore, the state court determined that the counsel's cross-examination of the state's key witness was not affected by the fact that counsel had attended the same high school. Finally, the court found that the defense counsel had good cause for not objecting to the state's challenge of certain veniremen, and that counsel made a reasonable investigation of certain extraneous evidence admitted during the punishment phase of the trial. In short, the state court found against Graham on every issue of fact upon which he predicated his ineffective counsel claim and concluded that counsel had competently and effectively represented Graham.

Having reviewed the record and the state court's findings of fact, we must conclude that Graham has failed to overcome the presumption that the state court's findings were correct. *See Sumner v. Mata*, 101 S.Ct. at 771.

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[12] Graham's prior psychiatric evaluations were consistent and showed that Graham was competent to stand trial. This comported with defense counsel's own view of his client's competency.

Graham has failed to present a meritorious challenge on this issue.

F.

In Graham's sixth point of error, he makes a broadside attack on the Texas death penalty statute, alleging that it violates the fourth, fifth, sixth, eighth and fourteenth amendments to the Constitution. In particular, Graham maintains that the Texas capital punishment system produces arbitrary results and does not provide proportionality. This contention lacks merit in view of the Supreme Court's holdings in *Franklin v. Lynaugh*, ___ U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In *Franklin*, although the issue of proportionality was not directly before the Court, Justice White did note that the Texas capital sentencing scheme properly structured jury discretion. ___ U.S. at ___, 108 S.Ct. at 2331. The Court more directly addressed this issue in *Jurek* when it stated:

> Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the even-handed, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution.

96 S.Ct. at 2958. *See also McCleskey v. Kemp*, ___ U.S. ___, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987); *Pulley v.*

Harris, 465 U.S. 37, 104 S.Ct. 871, 879, 79 L.Ed.2d 29 (1984). We therefore reject Graham's contentions.

G.

Graham also asserts for the first time that his due process and equal protection rights were violated because individuals under eighteen-years old were statutorily excluded from the grand and petit jury and, in addition, blacks were substantially and systematically excluded. The state court specifically found that the peremptory challenges against blacks resulted from the veniremen's testimony that they were opposed to the death penalty. Since the state court has reviewed the record and concluded that Graham has failed to build a prima facie case of discrimination in either the grand or petit jury selection, we must concur with the state court's decision. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1722, 90 L.Ed.2d 69 (1986); *see also Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 771, 66 L.Ed.2d 722 (1981); *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977); *United States v. Cronn*, 717 F.2d 164, 168 n. 7 (5th Cir. 1983), *cert. denied*, 468 U.S. 1217, 104 S.Ct. 3586, 82 L.Ed.2d 884 (1984).

Finally, we know of no case law which suggests that exclusion of eighteen-year-olds is unconstitutional, and Graham has failed to show how such an exclusion has denied him a fair jury trial. *See Carter v. Jury Commission*, 396 U.S. 320, 90 S.Ct. 518, 525, 24 L.Ed.2d 549 (1970).[13]

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[13] As a last point of contention, Graham objects to the federal district court's summary dismissal of his claim. He

(Continued on following page)

III

In conclusion, the petitioner has not made a substantial showing of a denial of a federal right and we therefore must deny his petition for a certificate of probable cause.

However, because the Supreme Court has granted certiorari in *High v. Kemp*, 819 F.2d 988 (11th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988) and *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), we will continue our stay until 12:01 a.m., September 30, 1988, in order to give Graham an opportunity to petition the Supreme Court for certiorari; and, if a petition is filed, this stay shall continue in effect until such time as the Supreme Court has acted.

PETITION FOR CERTIFICATE OF PROBABLE CAUSE DENIED.

(Continued from previous page)

argues that the district court conducted an ex parte investigation without giving him the opportunity to file an answer. Finally, Graham alleges that the district court did not provide him an opportunity to inspect and review all documents that it considered. He contends that these omissions violated 28 U.S.C. § 2254, Rules 4 and 5. These assertions are hollow. Rules 4 and 5 do not bind the district courts in such a manner. In any event, Graham has not shown any prejudice arising from these alleged deprivations.

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director Texas Depart. of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals, Fifth Circuit.

March 7, 1990.

Appeal from the United States District Court for the Southern District of Texas.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before REAVLEY, KING and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:

We have been directed to revisit this case by the Supreme Court, which vacated our prior decision, reported at 854 F.2d 715, and remanded for further consideration in light of *Penry v. Lynaugh*, ___ U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The narrow issue we reach on remand is whether under the Texas capital sentencing system a jury is able to consider and give effect to youth as a mitigating factor without special instructions. We conclude that a jury is unable to do so and therefore vacate Graham's capital sentence.

I.

In remanding this case, the Supreme Court neither expressed nor suggested disagreement with any part of our prior opinion other than that relating to Graham's argument that the Texas statutory sentencing procedure does not allow the jury to consider fully the relevant mitigating circumstances, which is discussed in section IIB of that opinion. Accordingly, with the exception of section IIB, we reinstate our prior opinion.

II.

B.

Capital punishment jurisprudence has progressively refined the constitutional boundaries within which a sentencing jury may impose the death penalty. The general contours of those limits permit imposing a sentence of death only when the crime involves statutorily enumerated aggravating circumstances and after a jury has been able to consider and to give effect to any mitigating circumstances. *See Eddings v. Oklahoma*, 455 U.S. 104, 110-12, 102 S.Ct. 869, 874-75, 71 L.Ed.2d 1 (1982); *Gregg v. Georgia*, 428 U.S. 153, 195-97, 96 S.Ct. 2909, 2935-36, 49 L.Ed.2d 859 (1976). This structure limits the imposition of the death penalty to egregious circumstances and meets the Eighth Amendment requirement of "an individualized assessment of the appropriateness of the death penalty." *Penry*, 109 S.Ct. at 2946.

In *Jurek v. Texas*, 428 U.S. 262, 276-77, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976), the Supreme Count upheld

the Texas capital sentencing system against broad constitutional attacks. However, in *Penry*, the Court narrowed the circumstances in which the Texas statute meets the requirements of the Eighth and Fourteenth Amendments. *See Penry*, 109 S.Ct. at 2947-52.

Under the Texas system, a jury sentencing a defendant found guilty of murder under aggravated circumstances must answer the following questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex.Code Crim.Proc.Ann. art. 37.07(b) (Vernon Supp.1990). If the jury unanimously answers "yes" to each question submitted, the trial court must sentence the defendant to death. *Id.* art. 37.071(c)-(e). If any question is answered in the negative, the defendant receives a life sentence. *Id.* art 37.071(e).

The Texas statute's constitutionality has repeatedly turned on the issue of "whether the enumerated questions allow consideration of particularized mitigating factors." *Jurek*, 428 U.S. at 272, 96 S.Ct. at 2956. The statute withstood constitutional attack in *Jurek*, because "three

Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question – despite its facial narrowness – so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." *Lockett v. Ohio*, 438 U.S. 586, 607, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973 (1978) (quoting *Jurek*, 428 U.S. at 272, 96 S.Ct. at 2956 (Stevens, J., plurality)).

In *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), the Court again considered the constitutionality of the Texas system. Franklin claimed his Eighth Amendment rights were violated by the trial court's refusal to instruct the jury on the effect of mitigating evidence under the statute. The case produced a plurality opinion, with Justices O'Connor and Blackmun concurring in the result. Justice White, writing for the plurality, stated that "[i]t is the established Texas practice to permit jury consideration of ' "whatever mitigating circumstances" the defendant might be able to show' in capital sentencing." *Id.* 108 S.Ct. at 2326 (White, J., plurality). He also noted that the only mitigating evidence Franklin offered – his good prison record – could be considered in response to the future dangerousness question. *Id.* at 2329. Justice White further indicated that a state may "channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty," *id.* at 2331,[1] and ultimately

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[1] Chief Justice Rehnquist and Justices White, Scalia, and Kennedy adhered to this view in the *Penry* dissent, penned by Justice Scalia. *See Penry*, 109 S.Ct. at 2967-69.

concluded that the trial court's refusal to issue special instructions did not violate the Eighth Amendment, *see id.* at 2332.

In her concurrence, Justice O'Connor took issue with the plurality's suggestion that a state could restrict a jury's ability to consider mitigating evidence and underscored the importance of allowing the jury to give effect to mitigating evidence that is "relevant to the defendant's character or background or the circumstances of the offense." *Id.* at 2332-33 (O'Connor, J., concurring). However, Justice O'Connor concluded that the Eighth Amendment did not require special instructions in that case because the evidence of Franklin's good prison disciplinary record could be considered and given effect in answers to the question of future dangerousness. *Id.* at 2333.

The *Penry* Court, however, did find that the statute could be unconstitutionally applied in some circumstances. Like Franklin, Penry had argued that his Eighth Amendment rights were violated by the trial court's refusal to instruct the jury on the effect of mitigating evidence under the statute. However, Penry had offered evidence of his mental retardation and abused childhood as factors mitigating against the imposition of the death penalty, rather than simply a good prison record. *Penry*, 109 S.Ct. at 2952. The distinction between *Franklin* and *Penry* rested upon the relevance of Penry's evidence to his background and its reflection on his moral culpability.

Justice O'Connor, writing for the majority, stressed that "the punishment should be directly related to the

personal culpability of the defendant. . . . " *Id.* at 2951.[2] The Eighth Amendment requires consideration of a capital defendant's background and character " 'because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Id.* at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)). In examining the statutory questions that the jury must consider in returning a verdict for death, she found that the jury had insufficient latitude to express its findings regarding culpability. With respect to the first question. Justice O'Connor noted that while the jury was able to consider Penry's mental retardation and abused childhood in answering the questions regarding deliberateness, "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.' " *Id.* 109 S.Ct. at 2949. Thus the mitigating effects of mental retardation and an abused childhood could not be given full effect in response to this question.

With regard to future dangerousness, the evidence of Penry's mental retardation and abused childhood was viewed as a "two-edged sword." *Id.* One effect of mental retardation is the inability to learn from one's mistakes. Although retardation may diminish blameworthiness, it also makes it more likely that a retarded defendant will be dangerous in the future. A juror could have found

[2] The majority with regard to this issue was comprised of Justices O'Connor and Blackmun and the three *Franklin* dissenters, Justices Stevens, Brennan, and Marshall.

both that Penry posed a future danger and that he was less culpable than a person with average intelligence. However, the question provides no vehicle for expressing the finding of reduced culpability. *Id.* The Court also found that the third question provided an inadequate alternative for addressing reduced culpability. *Id.* at 2950. Accordingly, because the evidence was relevant beyond the scope of the special issues, the Court concluded that the statutory questions did not adequately provide the jurors with an opportunity to give a "reasoned moral response" to that evidence. *Id.* at 2952.

We understand the Court's rule after *Penry* to be this: a jury sentencing a capital defendant who provides evidence about his character, his background, or the circumstances of the offense that is relevant to personal culpability beyond the scope of the statutory questions must receive instructions that allow the jury to give effect to such evidence. However, in the *Franklin-Penry* aftermath, we are left with the task of determining which type of evidence mandates special instruction.[3] At the outset

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[3] The Supreme Court has assumed that additional instructions could answer the problem, perhaps by broadly defining "deliberately" in the first jury question. *See Penry*, 109 S.Ct. 2949 and *Jurek*, 96 S.Ct. at 2956 n. 7. We have great difficulty with that assumption and believe it to be necessary to submit another question in order that the jury might give effect to all mitigating factors. *See State v. Wagner*, 309 Or. 5, 28-29, 786 P.2d 93, 106-07 (1990) (en banc) (indicating that Oregon courts are constitutionally required to add a fourth question under a statutory scheme similar to that of Texas). If the jury decides that the defendant, after careful consideration, fully intended to take the life of his victim, how can "deliberately" be

(Continued on following page)

we note that no procedural bar objection has been raised and that the case has been presented for a decision on the merits. Additionally, although Graham's counsel did not request an additional instruction at trial, such a request is not an element of a *Penry* claim. *Mayo v. Lynaugh*, 893 F.2d 683, 688-90 (5th Cir.1990) (suggestion for rehearing en banc pending).

The mitigating evidence that Graham introduced during sentencing included his youth and his difficult childhood. Graham argues this evidence is relevant beyond the scope of the special questions and that, because no additional instructions were given, the Texas statute was unconstitutionally applied in his case. Because of Graham's age, we agree.

Graham was seventeen years old at the time that the murder was committed. His stepfather, Joe Samby, and his grandmother, Erma Chron, testified on his behalf.

(Continued from previous page)

"defined" to require a negative answer to the inquiry where the jury also decides that an abused and retarded adolescent should not be put to death for his wrong – even though it was certainly committed "deliberately"? The requested issues in *Franklin* are set forth at 108 S.Ct. 2324 n. 4. The Jury would certainly be confused by instructions that seem to be allowing a "no" answer even when the question itself calls for a "yes" answer. And if the instruction should be given, modifying the plain meaning of the question, and if the jury answers "yes," how are we to know that the jury actually considered and rejected all evidence mitigating against the death penalty rather than gave its honest answer to the question that was asked?

Samby testified that Graham, who lived and worked with his father, would visit his mother once or twice a week and would help with chores around the house. He also testified that Graham loved his mother, who was currently on medication and was a "nervous type."

Chron testified that Graham began staying with her intermittently, beginning at the age of three, because his mother was hospitalized "at least twenty" times for a nervous condition that Chron classified as mental illness. Graham then went to live with his father at the age of eleven or twelve. Chron further testified that while Graham was living with her, he went to church and school, was never violent, never possessed weapons, and never gave her any problems.

Age has long been considered "one of the individualized mitigating factors that sentencers must be permitted to consider. . . . " *Stanford v. Kentucky*, ___ U.S. ___, 109 S.Ct. 2969, 2978, 106 L.Ed.2d 306 (1989); *see Eddings*, 455 U.S. at 115-16, 102 S.Ct. at 877; *Jurek*, 428 U.S. at 272-73, 96 S.Ct. at 2956-57; *Gregg*, 428 U.S. at 197, 96 S.Ct. at 2936. A jury also must be able to give effect to "evidence of a turbulent family history" in the capital sentencing of a minor. *Eddings*, 455 U.S. at 115-17, 102 S.Ct. at 877-78.

Moreover, age reflects on moral culpability. In *Thompson v. Oklahoma*, the Court restated "the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 2698, 101 L.Ed.2d 702 (1988) (Stevens J., plurality); *see id.* at 2708 (O'Connor, J., concurring in the judgment)

("Granting the plurality's other premise – that adolescents are generally less blameworthy than adults who commit similar crimes. . . . "). This conclusion is premised on the notion that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 2699 (Stevens, J., plurality). In sum, "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.*

The state argues, however, that Graham was not entitled to a special instruction because the evidence of youth and a difficult home life is not relevant beyond the scope of the statutory questions. The state points out that the relevant problems of adolescents – limited abilities to control impulsive behavior, to evaluate the future consequences of their actions, and to appreciate the possibility and finality of death – can be considered in answering the deliberateness question. That, however, does not end the matter, because a jury that found Graham had acted deliberately might also find him less culpable than an adult. If so, the jury would be compelled to answer the issue affirmatively, and it would be unable to give full effect to Graham's mitigating evidence. *See Penry*, 109 S.Ct. at 2949.

The state further argues that all of the mitigating qualities associated with adolescence are squarely addressed by the future dangerousness question. The

state notes that any limitations attributable to adolescence are necessarily transitory. It then argues that a juror finding Graham's moral culpability reduced as a result of his youth could have given effect to the evidence by finding that he did not present a danger in the future. This argument, however, ignores the possibility that a juror could find Graham likely to be dangerous in the future but could also conclude that he was less culpable as an adolescent. If so, that juror could not give effect to the finding of reduced culpability in answering the question.[4] The point of *Penry* is not that a special instruction is unnecessary if a jury could give *some* effect to relevant evidence through the statutory questions; rather, a special instruction is required if a jury cannot give *full* effect to that evidence.

The dissent argues that the mitigating value of youth, without more, is fully covered by the two issues of the Texas verdict. Accordingly, he believes that a special instruction was unnecessary because Graham did not argue that his youth was relevant to any issue other than his future dangerousness and because he did not suggest that his crime was in any way attributable to his youth or to any characteristic associated with his youth.

This view is too restrictive. Adolescence alone is a possible mitigating factor against a sentence of death. The jury was entitled to draw on its common experience and consider the mitigating effect of Graham's youth. A juror

[4] The third question was not presented to the jury.

who concluded that Graham deliberately committed murder and posted a future danger but who also concluded that a punishment of death was less justified for him because of his age was not able to give effect to that judgment. Without special instruction under these circumstances, "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 2952.[5]

The state further contends that even if an instruction was erroneously omitted, that error was harmless. We can not accept that argument. The risk that a defendant will be sentenced to death in spite of factors that "may call for a less severe penalty" is incompatible with principles of the Eighth and the Fourteenth Amendments. *Lockett*, 438 U.S. at 605, 98 S.Ct. at 2965.

The district court's judgment is reversed, and the death sentence is vacated. The cause is remanded to the district court for further orders.

E. GRADY JOLLY, Circuit Judge, dissenting:

I respectfully dissent from the majority's effectively setting aside the death penalty in this case on grounds of what amounts to the failure of the trial judge, sua sponte, specifically to instruct the jury that it was free to grant

[5] The dissent understands our ruling to mean that "the jury should have been permitted to exercise a discretionary grant of mercy, notwithstanding Graham's moral or personal culpability, simply because of Graham's youth." However, it is precisely because Graham's youth reflects upon his moral culpability that we believe the Eighth Amendment mandates a jury instruction.

mercy solely because of the defendant's youth at the time of the offense.

With respect to Gary Graham's youth as a sentencing factor, the jury was presented with nothing more than the fact that he was seventeen years old at the time he committed the offense. That isolated fact, without further development, does not furnish a base upon which a reasonable juror could rationally conclude that Graham bears less moral culpability than other citizens. *See Kelly v. Lynaugh*, 862 F.2d 1126, 1133 n. 12 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3263, 106 L.Ed.2d 608 (1989).

I do not dispute that age at the time of the offense can be a relevant mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). The reason that youth can be a relevant mitigating factor is the "recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults." *Eddings*, 102 S.Ct. at 877 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, 61 L.Ed.2d 797 (1979)). Youth can mitigate against imposition of the death penalty because a juror could conclude that a defendant who commits a criminal act *attributable to that defendant's youth* is less culpable than a defendant who has no such excuse, and that such a defendant should not receive the ultimate penalty. *See California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring).

As presented in this case, Graham's youth presented no mitigating factor beyond the scope of the special

issues. Graham's youth is obviously relevant to the first and second special issues of the Texas statute. In his argument to this court, Graham does not indicate how such evidence had relevance beyond the scope of the special issues. Moreover, during the sentencing phase of his trial, he introduced no evidence that would support such additional relevance. Specifically, Graham's counsel only urged the sentencing jury to consider his youth in deciding the answer to special issue no. 2, whether Graham was likely to pose a continuing threat to society. *See Russell v. Lynaugh*, 892 F.2d 1205 (5th Cir. 1989) (Texas statute constitutionally applied when mitigating evidence specifically proffered in context of special issues).

Nor did Graham introduce any evidence to suggest that the murder he committed was in any way attributable to his youth. Furthermore, in his closing argument during the sentencing phase of the trial, Graham's counsel did not even argue that Graham's crimes were attributable to his youth:

> Gary Graham 17 years old, went on a rage for 7 days. What did he do? He harassed people. He stuck guns in their face[s]. He shot an individual and he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days?. Drugs? Alcohol? Maybe. Life? Maybe.

In my view, no special instruction is necessary unless there is at least some evidence or argument from which a juror could reasonably conclude that a defendant who commits a criminal act attributable to that defendant's youth is less culpable than a defendant who has no such excuse. *See Penry*, 109 S.Ct. at 2947 (quoting *California v.*

Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)).

Nevertheless, if a juror, even in the absence of any evidence or argument suggesting as much, were convinced that Graham's moral culpability was somehow reduced because his crime was in some unspecified way attributable to his youth, that juror would surely reason that because youth is by nature a transitory condition, Graham would cease to act violently when he outgrew his adolescence. Such a juror would have been able to give full mitigating effect to the fact of Graham's youth by giving a negative answer to the future dangerousness inquiry of the second special issue.

Furthermore, Graham presented no evidence regarding psychological characteristics of his adolescence and their effects on his perceptions and behavior, and points to no such effects in his arguments to this court. Unlike Penry, Graham has made no attempt to relate these factors to his own situation. Here, if a juror believed, even in the absence of any evidence to support such a belief, that Graham, because of his youth, had a limited ability to control impulsive behavior, evaluate the future consequences of his conduct, and appreciate the possibility and finality of death, that juror was free to give a negative answer to the first special issue as well, whether the defendant acted deliberately and with the reasonable expectation that death would result.

Therefore, in my view, the jury was able, without the need for any special instructions, to take into account all of the characteristics associated with Graham's youth, and give that mitigating evidence full effect in answering

the first and second special issues under the Texas statute.

The question is whether the jury instructions provide the jury with a vehicle for expressing a "reasoned moral response" to the mitigating evidence introduced by the defendant. *Penry*, 109 S.Ct. at 2952 (emphasis added). The majority fails to identify in the case before us and on the evidence before us how the jury was unable to make a *reasoned* moral response to the isolated and undeveloped fact of Graham's youth. The majority acknowledges that youth is relevant to the first and second special issues, but believes that the jury should have been permitted to exercise a discretionary grant of mercy, notwithstanding Graham's moral or personal culpability, simply because of Graham's youth. In my view, such a response by the jury in this case, where there is no evidence or argument that Graham's crime was attributable to his youth or that any characteristics of his youth have relevance to his personal or moral culpability beyond the scope of the statutory issues, would not be a *reasoned* moral response, but an *unreasoned* response. I cannot agree with the majority that the defendant has a constitutional right to such unbridled jury discretion. The evidence before the jury simply offered no basis upon which a *reasoned* moral judgment would excuse the death penalty in this case.

Finally, the majority's formulation of the *Penry* rule omits any reference to the Supreme Court's statement that the jury must, *upon request*, be given instructions that allow the jury to give effect to evidence about the defendant's character, background, or the circumstances of the crime that is relevant to the defendant's moral culpability beyond the scope of the special issues. *Penry*, 109 S.Ct. at

2945. Graham's counsel did not object to the jury instructions that were given, nor did he request any additional instructions or a fourth special issue. In my view, a request for instructions is an integral part of a *Penry* claim. *Cf. Mayo v. Lynaugh*, 893 F.2d 683 (5th Cir. 1989) (Suggestion for rehearing en banc pending) "Mayo's counsel satisfied the prerequisites of the claim by offering mitigating evidence at the sentencing phase.").

For the foregoing reasons, I believe that Graham's sentencing jury was fully able to give a "reasoned moral response" to the fact of Graham's youth when it answered the special issues of the Texas statute. Because I believe that the Texas statute was constitutionally applied to Graham, I respectfully dissent.

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director, Texas Dept. of Crim. Justice, Institutional Div., Respondent-Appellee.

No. 88-2168.

United States Court of Appeals,
Fifth Circuit.

June 4, 1990.

Appeal from the United States District Court for the Southern District of Texas; David Hittner, District Judge. Presiding.

ON SUGGESTION FOR REHEARING EN BANC

(Opinion March 7, 1990, 5 Cir., 1990, 896 F.2d 893)

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this case shall be reheard by the Court en banc with oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

Gary GRAHAM, Petitioner-Appellant,

v.

James A. COLLINS, Director, Texas Dept. of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 88-2168.

United States Court of Appeals,
Fifth Circuit.

Jan. 3, 1992.

Appeal from the United States District Court for the Southern District of Texas.

On Remand from the Supreme Court of the United States

Before CLARK, Chief Judge, REAVLEY, POLITZ, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

A panel of this Court previously affirmed the district court's denial of Gary Graham's habeas corpus petition challenging his Texas capital murder conviction and death sentence. *Graham v. Lynaugh*, 854 F.2d 715 (5th Cir.1988). Thereafter, the United States Supreme Court, in *Graham v. Lynaugh*, 492 U.S. 915, 109 S.Ct. 3237, 106 L.Ed.2d 585 (1989), issued a per curiam order that granted Graham's petition for writ of certiorari, vacated

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* Judges Emilio M. Garza and Harold R. DeMoss, Jr. were sworn in after this case was argued to the En Banc Court and elected not to participate in this en banc decision.

the judgment of this Court, and remanded the case to this Court "for further consideration in light of *Penry v. Lynaugh*," 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Pursuant to that remand order, a panel of this Court reconsidered the case, and, by a divided vote, vacated Graham's death sentence, the panel majority determining that the Texas capital sentencing system was unconstitutionally applied in Graham's case because the jury at the sentencing phase of his trial, having been given no special instructions, was not able to adequately consider and give effect to Graham's youth as a mitigating factor. *Graham v. Collins*, 896 F.2d 893 (5th Cir.1990). Having ordered rehearing en banc, *Id.* 903 F.2d 1014 (5th Cir.1990), we have again reconsidered the case in light of *Penry* and, disagreeing with the panel majority's determination in this respect, we now reinstate our former affirmance of the district court's denial of habeas relief.

Procedural History

Over his plea of not guilty, Graham was convicted by a Texas court jury in October 1981 of the offense of capital murder, the May 1981 intentional killing of Bobby Lambert by shooting him with a pistol while in the course of robbing or attempting to rob him. Texas Penal Code, art. 19.03(a)(2). At the sentencing phase of the trial, the jury answered in the affirmative each of the three special issues provided for in Texas Code of Criminal Procedure, art. 37.071(b), and Graham was accordingly sentenced to

death.[1] On direct appeal, Graham's conviction and sentence were affirmed by the Texas Court of Criminal

[1] The 1988 and 1990 panel opinions in this case erroneously indicated that only the first two issues specified in art. 37.071(b) were submitted. *See, id.*, 896 F.2d at 898 n.4 and 854 F.2d at 718.

Until 1991, sections (a) through (e) of art. 37.071 provided, as they did also in 1981, as follows:

> "(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
>
> "(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:
>
> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> "(2) whether there is a probability that the defendant would commit criminal acts of violence

(Continued on following page)

Appeals in an unpublished opinion. Graham subsequently sought habeas corpus relief in the Texas courts.

(Continued from previous page)

> that would constitute a continuing threat to society; and
>
> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> "(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.
>
> "(d) The court shall charge the jury that:
>
> "(1) it may not answer any issue 'yes' unless it agrees unanimously; and
>
> "(2) it may not answer any issue 'no' unless 10 or more jurors agree.
>
> "(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life."

The above provisions are the same as when the statute was first enacted in 1973 (except that by 1981) amendment the word "three" was inserted in the opening clause of section (b)).

In May 1991 the Texas Legislature passed two bills amending art. 37.071. S.B. 880, ch. 838, 72nd Leg., R.S. 1991,

(Continued on following page)

After holding an evidentiary hearing on Graham's allegations, the convicting trial court recommended denial of

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extensively amends the Texas capital sentencing procedure, including art 37.071, and specifies an effective date of September 1, 1991, but is expressly made applicable "only" to offenses "committed on or after September 1, 1991." S.B. 880, § 5. The changes made by S.B. 880 § 1 to art. 37.071 include the entire elimination of the former first and third special issues (the former second special issue is retained verbatim in all cases), provision for a new special issue where the jury charge allowed the defendant to be found guilty under the law of parties, and provision in all cases for the following new special issue:

> "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed."

If all issues submitted are answered adversely to the defendant, the sentence is death; otherwise, the sentence is life imprisonment. S.B. 880 was finally passed May 17, 1991, and was filed without the Governor's signature on June 16, 1991. The other bill, H.B. 9, ch. 652, 72nd Leg., R.S. 1991, was finally passed May 27, 1991, and was signed by the Governor June 16, 1991. Section 9 of H.B. 9 provides that art. 37.071 "is amended to read as follows" setting it out in full in the *same* form as it existed previously (or before May 1991) with only minor, technical changes (a new section 1 is added providing that the judge shall sentence the defendant to life imprisonment if the state does not seek the death penalty; the remainder of art. 37.071 is put in to its section 2, stated to apply only if the state seeks the death penalty; the only other changes are from

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relief, transmitting to the Court of Criminal Appeals findings and conclusions rejecting Graham's contentions. The Court of Criminal Appeals thereafter denied relief pursuant to an unpublished opinion.

Graham then brought the present proceedings under 28 U.S.C. § 2254 in the district court. That court denied relief without an evidentiary hearing, and denied stay of execution and a certificate of probable cause. A panel of this Court granted an interim stay, but ultimately denied Graham's application for certificate of probable cause. *Graham*, 854 F.2d 715. Judge Jolly, in his opinion for the panel consisting of himself and Judges Reavley and King, considered and rejected seriatim each of Graham's several claims. In part IIB of the opinion, the panel dealt with Graham's contention that the Texas statutory special issues, which mandate the death penalty if all are answered affirmatively, *see* note 1, *supra*, do not permit the jury to adequately weigh mitigating circumstances when formulating their answers. *Id.* at 718-20. The factors Graham relied on as mitigating were primarily his youth – he was seventeen at the time of the offense – and certain

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"upon" to "on" at the beginning of section 2(a) and using the current designation for the former Texas Department of Corrections in section 2(e)). H.B. 9 specifies September 1, 1991 as its effective date (section 16), and its section 15(a) states: "(a) the changes in law made by Section 1-9 and 11, 12, and 13 of this Act apply to the trial of a capital offense that commences on or after the effective date of this Act, whether the trial is for an offense committed before, on, or after the effective date."

We merely note these 1991 enactments, and express no opinion with respect to whether, for offenses committed on or after September 1, 1991, the controlling form of art. 37.071 is as provided in S.B. 880 § 1 or H.B. 9, § 9.

matters reflected by evidence concerning his childhood.[2] *Id.* The panel relied particularly upon *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), and concluded by holding that "the jury's verdict . . . is consistent with the constitutional requirements outlined in *Franklin* and other precedents." *Id.* at 719.[3]

Following the Supreme Court's remand for reconsideration in light of *Penry*, the panel again grappled with this difficult issue.[4] Judge Reavley, for the panel majority, held that:

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[2] The panel also, among other things, rejected Graham's contention that the Eighth Amendment prohibited execution for an offense committed when the defendant was less than eighteen years old. *Id.* 854 F.2d at 717-718.

[3] The 1988 panel did, however, observe (*id.* at 720, n.8):

> "We do not suggest that this area of the law is devoid of wrinkles. The Supreme Court has recently granted certiorari in the case of *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir.1987), *cert. granted*, [487] U.S. [1233], 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). In *Penry*, our court closely scrutinized evidence of Penry's mental retardation and concluded that there was some doubt whether the Texas statute permitted this evidence to be considered in answering the sentencing questions. 832 F.2d at 925."

[4] With respect to the other issues in the case, the 1990 panel opinion observed:

> "In remanding this case, the Supreme Court neither expressed nor suggested disagreement with any part of our prior opinion other than that relating to Graham's argument that the Texas statutory sentencing procedure does not allow the jury to consider fully the relevant mitigating circumstances, which is

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> "The mitigating evidence that Graham introduced during sentencing included his youth and his difficult childhood. Graham argues this evidence is relevant beyond the scope of the special questions and that, because no additional instructions were given, the Texas statute was unconstitutionally applied in his case. Because of Graham's age, we agree." *Id.* at 897.[5]

Judge Jolly, in his 1990 dissent, concluded that the second special issue adequately encompassed any mitigating aspects of youth that the jury must constitutionally be free to consider, as Graham's youthfulness was such a factor only to the extent his offense was a product of it, and youth was necessarily a transitory condition that the jury could fully take into account "by giving a negative answer to the future dangerousness inquiry of the second special issue." *Id.* at 899.

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> discussed in section IIB of that opinion. Accordingly, with the exception of section IIB, we reinstate our prior opinion." *Id.* 896 F.2d at 894.

We agree, and reinstate this portion of the 1990 panel opinion. For the same reason, we similarly deny relief with respect to Graham's contentions addressed in footnotes 5, 7, and 9 of the 1988 panel opinion. *Id.* 854 F.2d at 718 n. 5, 719 nn. 7 & 9.

[5] The 1990 panel majority, though summarizing the evidence presented by Graham respecting his childhood, *id.*, did not address whether that evidence, of itself, would have required some further instruction or jury submission beyond that given. As to the *Penry* issue, the panel only addressed "Graham's age."

Context Facts

At the guilt-innocence phase of the trial, Graham's defense was essentially only one of insufficient identification. The state presented several witnesses to the shooting, which occurred at about 9:30 p.m. on Wednesday, May 13, 1981, in the parking lot of a Safeway Food Store in Houston, Texas. The perpetrator, a man wearing black pants and a white jacket, bumped into Lambert, who was carrying a sack of groceries out of the store, and attempted to grab Lambert's wallet. Some of the testimony indicated that there was a brief struggle between the two. Lambert pushed at the perpetrator, and each steeped back; the perpetrator produced a pistol, leveled it at Lambert's chest, and shot him in the heart from a distance of about two to three feet. The perpetrator then fled without being apprehended. Lambert staggered back toward the store, fell, and died on the spot. The perpetrator had been observed in the store when Lambert was there, but had left a few minutes before Lambert did. So far as the evidence showed, the perpetrator acted alone. Only one of the witnesses, Mrs. Skillern, was able to identify Graham as the perpetrator.[6] She ultimately so identified Graham in a May 26 photographic display and in a May 27 police station "line up," as well as in her open court trial testimony. Defense counsel attacked Mrs.

[6] The other witnesses did not testify to anything suggesting that Graham was not (or did not resemble) the perpetrator, but merely stated that they did not get a good enough look at (or sufficiently recall) the perpetrator's face to make an identification.

Skillern's identification, both by vigorous cross-examination and by emphasizing in argument the failure of the other witnesses, at least one of whom was closer to the events in question, to make an identification.[7] However, no defense evidence was presented. In closing argument defense counsel did not suggest that the evidence failed to show that the offense charged had been committed, but rather that it failed to show that Graham was the one who committed it.

At the sentencing hearing, no evidence was introduced concerning the offense of conviction. The state introduced extensive evidence showing that on five different days during the week following his murder of Lambert, Graham committed robberies at a total of nine separate locations and in each instance Graham leveled either a pistol or a sawed-off shotgun on the victim. The first of these was on May 14, and the last on May 20. These offenses involved some thirteen different victims, including women aged fifty-seven and eighteen and men aged sixty-four, fifty-seven, eighteen, and other ages. With respect to a few of these occasions, the evidence indicated Graham was using marihuana. In addition to money and personal effects, five vehicles were stolen. Two of the victims were pistol whipped, one of them being shot in the neck. These were the only serious physical injuries. Graham glancingly struck another victim, the sixty-four-year-old man, with the vehicle he was stealing,

[7] The defense also sought to suppress Mrs. Skillern's testimony on the basis that the photographic display and line-up were unduly suggestive. After an extensive hearing out of the presence of the jury, this motion was overruled.

apparently trying to run over him. The fifty-seven-year-old woman was kidnapped and raped, after which Graham fell asleep in her apartment, she contacted the police and he was arrested there, thus bringing his crime spree to an end. On five of these occasions Graham apparently acted alone; on four others an accomplice (not shown to be of a different age from Graham) was present or nearby, but Graham wielded the weapon. At least six of the separate incidents, including that with the sixty-four year old and the two with the fifty-seven year olds, involved Graham practicing initial successful deception on the victim. The state also introduced testimony of a Texas Youth Council employee that she had been familiar since an unspecified time in 1989 with Graham's reputation in the community for being a peaceful and law-abiding citizen, and that it was bad; she gave no elaboration or specifics whatever and did not state how she acquired this information, except that it was not based on her own personal observation. This was the entirety of the state's evidence at the punishment stage.

The only evidence presented by the defense at the sentencing stage consisted of the testimony of Graham's stepfather, Joe Samby, and his grandmother, Erma Chron. Samby testified that he had been married to Graham's mother for about five years, and had known Graham for about five years. He said Graham was fifteen when he (Samby) first met him. Graham lived with his father, and worked with him, but Samby did not know what kind of work Graham did. Graham would come by Samby's house once or twice a week to visit his mother. Graham had "real, real respect for his mother. He cared about his mother. He was real close to his mama." His mother was

present in the courtroom, but Samby explained "she can't do nothing because she is on medication and nervous. She is the nervous type." Samby stated that he had never known Graham to be a violent person, that Graham had been "real nice, respectable" with him and, when requested to help out around Samby's house, such as by cutting the grass or to "clean up and help his mother," Graham "would do it and be glad to do it for me." Graham was one of four brothers, and had no sisters. Samby had three children of his own living in his house. Graham had two children, one four and the other two. Graham would "buy . . . clothes for his children and try to give them food."[8]

Chron testified that her grandson Graham began staying with her intermittently, beginning "when he was around three," because his mother was frequently hospitalized for a "nervous condition" that Chron said was "mental illness." He would stay with his mother when she was not hospitalized. However, at about age eleven or twelve, Graham went to live with his father and "he has been with his father ever since." Graham's mother had been hospitalized "at least twenty times." Chron further stated that while Graham was living with her he attended school, "he would go to church all the time and everything. He loved the Lord," and he didn't give Chron "any problems or trouble." Chron also testified that Graham never had any weapons, and "he has never been violent."

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[8] There was no evidence as to where Graham's children lived or whether Graham was or had been married.

Apart from Samby's testimony that he had known Graham about five years and first knew him when Graham was fifteen, which would indicate that Graham was nineteen or twenty when the offense was committed, there was no evidence before the jury as to Graham's age.[9] Nevertheless, each of Graham's two attorneys, in their closing arguments at the punishment stage, argued to the jury, without prosecution objection, that Graham was seventeen when his offense was committed.

The first defense counsel's argument included the following:

> "We have to make a decision on this young man, Gary Graham. What do we know about Gary Graham? One thing we know about Gary Graham is from May 13 through May 20th he reaped havoc and hell on a lot of people. May 13, 14, 15, 16, 18 and 20th five days. Pure hell. What do we know about Gary Graham? We know that at age 3 he went to live with his Grandmother because his Mother was placed in a mental institution or placed herself in a mental institution. We know he lived on and off with his Grandmother and when she would come out

[9] However, it is undisputed that Graham was in fact born on September 5, 1963, this being reflected in a report of a pretrial psychiatric examination filed in the papers of the case in August 1981, the examination having been ordered by the court on motion of defense counsel. Graham was thus seventeen years and eight months of age when the offense was committed. Records of the late May 1981 line-ups at which Graham was identified, which were not before the jury but were put in evidence only in hearings out of the presence of the jury on suppression motions, also reflect that Graham was seventeen at that time.

> of the hospital he would live with her and when she would go back he would go live with his Grandmother. Draw your own conclusions to that, what type of life he lived. You heard from his Step-father. He stated that Gary Graham would come to his house and visit his Mother every now and then. You heard from his Grandmother, that Gary Graham has 2 children of his own. . . . Gary Graham is a young man. No doubt about it. . . . A young man, hasn't even reached 20 years old. Not even 20 years old. He goes on a rage for 7 days. 7 days out of his life. He is not going to ever forget. . . . I would hope that it was something on the witness stand that you either heard that show some redeeming value. Something in Gary Graham's life to say that possibly he can be rehabilitated. Possibly. And I would urge each and every one of you all that there is a glimmer or a possibility that his life can change, given that opportunity. . . . Gary Graham, 17 years old, went on a rage for 7 days. What did he do? He harassed people. He stuck guns in their fact. He shot an individual and he killed another individual. What was it in response to? Why did he become so aggressive? What makes an individual go on a rage for 7 days? Drugs? Alcohol? Maybe. Life? Maybe. . . . "

Graham's other counsel argued in a similar vein, stating:

> " . . . there are only two answers, and that is a choice. Life or death. Life in the penitentiary at the age of 18 years old. What is the meaning of punishment? Why do we punish. . . . We are all leaving. Everyone here gets to leave but him. He either goes to live for life in the penitentiary or be prepared for death by injection, and when

you look at a young man of his age, what do you think about? What do you think about the years when you think about death. You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where their [sic] going or what they want to do. Some of us are more fortunate. You also have to look at changes in society. Changes in ages. See, because what you are called upon to do is predict whether some time in the future Gary Graham could become a person fit to return to society. At least he is alive. See, when you are 17 or 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and middle 30's, a change a little bit from your more radical stands to a more somewhat upright posture because you have had not only time to think., but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above. . . . because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live. . . . "

The prosecution's argument did not refer to Graham's age in any way except to once acknowledge "his youth." The prosecution stressed Graham's killing of Lambert and his other many serious offenses in the following week, stating in part:

"Gary Graham does have direction, and he has shown you that direction. He has shown you that direction in every way that you can possibly look at. . . . [T]here are certain individuals in our society that we have got to look at. And we

have got to realize that are not fit to live with us. The evidence beyond a reasonable doubt shows that Gary Graham is not fit to live in this society, that he will constitute a continuing threat to society. Compassion? They ask for compassion. We ask you for his life. . . . Rights of the individuals of this society. The life of Bobby Grant Lambert. They say look at his youth. When does a human life taken the way he took that life of Bobby Grant Lambert cease to have meaning? It ceases to have meaning when the terror and the degradation of a man such as him holds the life in his hand. . . . Compassion? Care? Have you just looked at him? . . . Death is the only protection that you, as the jury, and society can protect from people and especially Gary Graham. The seeds of our past are the harvest of the future and what seeds has Gary Graham planted? And where has he sowed those seeds? In the fertile earth? No. He buried Bobby Grant Lambert in the earth. His seeds are death. Pain, Suffering. Humiliation. Degradation. What do those things bring? But one thing tell you what Gary Graham is. You have seen his actions. You have heard from the mouths of these people. Deliberate conduct. . . . "

Neither side made any objections to the other's argument. The court instructed the jury in accordance with article 37.071, including informing them that the sentence would be either "death or confinement in the penitentiary for life," and that in answering the three special issues they could take into consideration all the evidence submitted both at the guilt-innocence stage and at the

punishment stage.[10] The three special issues called for by art. 37.071(b) were submitted, and each was answered in the affirmative. Neither side objected to the charge or the issues submitted or requested any other or further instructions or issues.[11]

DISCUSSION

In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Supreme Court sustained the

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[10] The jury was also instructed that the state still had the burden of proof, which never shifted to the defendant, and that "each special issue submitted must be proved by the state beyond a reasonable doubt" and none could be answered "yes" unless all jurors were convinced beyond a reasonable doubt that it should be so answered.

[11] Prior to trial, the court had denied defense counsel's motion to "hold article 37.071 . . . unconstitutional and void." This motion was grounded on the contention that the special issues called for were too "vague and indefinite," and thus "allow total discretion to a jury to make unfavorable findings against a Defendant, and such findings may be based on any prejudice the jury may have, individually or as a whole." The supporting memorandum explained that "Article 37.071 leaves with both the judge and the jury a vas[t] residue of discretion which is precisely what the Supreme Court in *Furman [v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] condemned" and argues that "[c]onsequently, the inquiry [of the article 37.071 issues] is fraught with standardless discretion in the hands of the jury."

There was no suggestion in the motion or memorandum that defendant complained of insufficient discretion (or an insufficient vehicle to give effect to it) to determine that the defendant would not receive the death penalty, or that the jury was not given an adequate basis to consider or give effect to its conclusions concerning defendant's age or background. The complaint was indeed the reverse.

Texas capital sentencing procedure of art. 37.071. This case requires us to examine what, if anything, remains of *Jurek* and art. 37.071 after *Penry*. To provide context for this examination, an overview of some of the other leading decisions of the Supreme Court in this area is appropriate.

Context cases

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Court effectively struck down all capital punishment statutes then in place. The crucial votes in *Furman* were those of Justices Stewart and White, who, as Justice Scalia observed in *Walton v. Arizona*, ___ U.S. ___, 110 S.Ct. 3047, 3061, 111 L.Ed.2d 511 (1990) (concurring opinion), "Focused on the infrequency and seeming randomness" with which the death sentence was imposed under the then existing discretionary system.[12] Following *Furnam* some thirty-five states adopted new capital sentencing statutes that reduced or narrowed the sentencer's discretion in determining whether or not to impose the death penalty. The supreme Court ruled on five of these statutes on July 2, 1976. *Gregg v. Georgia*, 428

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[12] Justice Stewart, for example, observed that of those convicted of capital crimes "many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed" and that the Constitution could not tolerate system that "permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 92 S.Ct. at 2762-63. Justice White observed that under the statutes at issue "there is no meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not." *Id.* at 2764.

U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek; Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). *Gregg* sustained the Georgia statute, which directed the sentencer to consider listed and unlisted aggravating and mitigating circumstances, but allowed a death sentence only if at least one listed aggravating circumstance were found. The court observed that "Furman mandates" that the capital sentencer's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *id.* 96 S.Ct. at 2932, and warned against sentencing standards "so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Id.* at 2935 n. 46. *Gregg* goes on to note, however, that "the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk or arbitrariness or caprice." *Id.* at 2939". *Proffitt* applied the *Gregg* rationale to uphold the somewhat similar Florida scheme. *Woodson*, however, struck down the North Carolina statute under which the death penalty was made mandatory for first degree murder, in that case murder during the course of robbery. The Court noted that among the "constitutional short-coming[s]" of this statute was "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant," and that in capital cases the Eighth

Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense." *Id.*, 96 S.Ct. at 2991. *Roberts* applied the same rationale to invalidate the Louisiana statute under which the death penalty was likewise mandatory for first degree murder.

We turn now to *Jurek*, decided the same day. There seven justices voted to uphold the Texas scheme as embodied in art. 37.071, but no opinion attracted more than three votes. The judgment of the Court was announced in Justice Stewart's opinion, which Justices Powell and Stevens joined, and this opinion has generally been understood as expressing the rationale of the Court's action.[13] Justice Stewart's opinion summarizes

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[13] Justice White, in an opinion in which then Chief Justice Burger and then Justice Rehnquist joined, likewise found the Texas statute constitutional. *Id.*, 96 S.Ct. at 2959-60. Justice White's opinion quotes the statutory special issues in full and observes that "[t]he statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions." *Id.*, at 2959.

Justice White, joined by then chief Justice Burger, Justice Blackmun, and then Justice Rehnquist, dissented in *Roberts*, *id.*, 96 S.Ct. at 3008-3020, and also in *Woodson*. Justice Blackmun wrote a separate dissent in *Woodson* and did not join Justice White's dissent there. *Id.*, 96 S.Ct. at 2992-93. In *Jurek* Justice Blackmun separately concurred in the judgment, with only a brief reference to his *Furman* dissent. *Jurek*, 96 S.Ct. at 2960. Justices Brennan and Marshall dissented in *Jurek*, as well as *Gregg* and *Proffitt*, on the grounds that the death penalty was unconstitutional *per se*. 96 S.Ct. at 2971-2977. They concurred in the result in *Woodson*, *id.*, 96 S.Ct. at 2992, and *Roberts*, *id.*, 96 S.Ct. at 3007, on the same basis.

the facts adduced at trial, including evidence that Jurek "22 years old at the time, had been drinking beer in the afternoon" of the offense, and that he "had always been steadily employed since he had left school and that he contributed to his family's support." *Id.*, 96 S.Ct. at 2954. In describing the Texas sentencing procedure, the opinion states that at the punishment phase the jury is "presented with two (sometimes three) questions, the answers to which determine whether a death sentence will be imposed." *Id.* (footnote omitted). It observes that only the first two issues specified in art. 37.071 were submitted, that both were answered yes, "and the judge, therefore, in accordance with the statute, sentenced the petitioner to death." *Id.* The opinion then quotes verbatim the full text of the three issues specified in art. 37.071, and continues by stating "[i]f the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed." *Id.* at 2955.

In evaluating the constitutionality of the Texas scheme, Justice Stewart notes that under *Woodson and Roberts* "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Id.* at 2956. The opinion then observes that "[t]he Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three questions," and "[t]hus, the constitutionality of the texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors." *Id.* The Court proceeds to answer this inquiry in the affirmative, but only with regard to the second – the

future dangerousness – special issue, because "[t]he Texas Court of Criminal Appeals has not yet construed the first and third questions . . . thus it is as yet undetermined whether or not the jury's consideration of those questions would properly include consideration of mitigating circumstances. In at least some situations the questions could, however, comprehend such an inquiry." *Id.* at 2956, n. 7. In turning to the second special issue, the opinion notes that "[t]he Texas Court of Criminal Appeals has yet to define precisely the meaning of such terms as 'criminal acts of violence' or 'continuing threat to society.' " *Id.* at 2956. It goes on to state (96 S.Ct. at 2956-57):

> "In the present case, however, it [the Texas Court of Criminal Appeals] indicated that it will interpret this second question so as *to allow a defendant to bring to the jury's attention* whatever mitigating circumstances he may be able to show:
>
> " 'In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age *of the defendant* and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider *whether the defendant was under an extreme form of mental or emotional pressure*, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.' [*Jurek v. State*] 522 S.W.2d [934], at 939-940 [Tex.Crim.App.1975]." (emphasis added).

After briefly considering one other Texas Court of Criminal Appeals decision,[14] Justice Steward's opinion states "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Id.* at 2957. The opinion concludes by observing:

> "*By authorizing the defense to bring before the jury* at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. . . . Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution. *Id.* at 2958 (emphasis added).

Two years later, in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court considered an Ohio death sentence imposed for the murder of a pawnshop operator in the course of an armed robbery of his shop while the defendant, an accomplice, waited outside in the getaway vehicle. Under Ohio law, as the Court construed it, the sentencing judge was required to impose the death sentence for the offense unless he found, by a preponderance of the evidence, one of the three statutory

[14] The case considered was *Smith v. State*, 540 S.W.2d 693, 696-97 (Tex.Crim.App.1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977), where the Texas court examined the sufficiency of the evidence to support the jury's affirmative answer to the second special issue. *Jurek*, 96 S.Ct. at 2957.

mitigating factors, namely (1) that the victim induced or facilitated the offense, or (2) that the defendant committed the offense under "duress, coercion, or strong provocation," or (3) that it was "primarily the product of" the defendant's "psychosis or mental deficiency." *Id.* 98 S.Ct. at 2959, 2966. "No one planned to kill the pawnshop operator in the course of the robbery." *Id.* at 2957. The presentence report reflected that the defendant, a twenty-one-year-old female, had committed "no major offenses" and that in the opinion of a psychologist her "prognosis for rehabilitation . . . was favorable." *Id.* at 2959. The sentencing judge found that the offense was not the product of psychosis or mental deficiency, did not address the other two statutory mitigating factors, and sentenced the defendant to death, stating "that he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty." *Id.* The plurality opinion by Chief Justice Burger, joined by Justices Stewart, Powell and Stevens, held that "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is inconsistent with the Eighth and Fourteenth Amendments. . . . a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.* at 2967. The scope of the plurality opinion is unclear. It focuses on the fact that under the Ohio statute the defendant's lack of specific intent to kill "is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors" and that "consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision." *Id.* at 2966-67. Similarly, the plurality notes that the

Ohio statute's "constitutional infirmities can best be understood by comparing it with the statutes upheld in *Gregg, Proffitt* and *Jurek*," *id.* at 2965, and "the statute now before us is significantly different" than those statutes. *Id.* 2966. More broadly, however, the opinion states that:

> " . . . a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. . . . that risk is unacceptable and incompatible with the command of the Eighth and Fourteenth Amendments." *Id.*

If the quoted language concerning "independent" mitigating weight is understood in its most apparent literal sense, the *Lockett* plurality would seem to be wholly inconsistent with *Jurek*, for in *Jurek* it is clear that the Supreme Court understood what the Texas statute so obviously facially provides, namely that although a wide range of evidence concerning the defendant's character and record and the circumstances of the offense is to be considered in determining whether or not to impose the death penalty, the consideration of that evidence is not "independent" of such relevance as the jury may find it has to the special issues. But such a construction of *Lockett* is not only much broader than the facts there, but is also at war with the plurality's statement that the Ohio statute was "significantly different" than the Texas enactment and that the former's deficiencies "can best be understood by comparing it with" the valid Texas statute.

Justice Blackmun concurred specially in *Lockett*, "for a reason more limited than that which the plurality espouses" namely that the Constitution forbids imposition of "the death sentence for a defendant who only aided and abetted a murder, without permitting *any* consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide." *Id.* at 2969 (initial emphasis added). Justice Marshall likewise concurred specially, adhering to his view that the death penalty was always unconstitutional, but also observing that the defendant "was sentenced to death for a killing that she did not actually commit or intend to commit" pursuant to "a statutory scheme that precluded *any effective* consideration of her degree of involvement in the crime, her age, or her prospects for rehabilitation." *Id.* at 2972 (emphasis added). Justice White concurred specially, expressly disagreeing with the plurality opinion, but concluding that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." *Id.* at 2983.[15] Then Justice Rehnquist dissented, and Justice Brennan did not participate.

The next significant decision in this context is *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), where the Court struck down a death sentence imposed on a sixteen year old, whom the sentencing

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[15] A modified version of this view subsequently gained majority support. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

judge found posed a continuing threat of violence to society. There, Justice Powell's plurality opinion focused on the fact that the sentencing judge appeared to have determined that "in following the law" he was not permitted to "consider" the defendant's troubled background, the evidence showing the defendant's neglectful and turbulent family environment, excessive physical punishment by his father, that the defendant was emotionally disturbed and his mental and emotional development were at a level several years below his chronological age, and that the offense was a product of these circumstances. *Id.* 102 S.Ct. at 873 & nn. 1 & 2, 877. The opinion also observed that the Oklahoma Court of Criminal Appeals, in reviewing the sentence, had noted that defendant's contention " 'that the killing was in actuality an inevitable product of the way he was raised,' " but held that " 'the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.' " *Id.* at 874. The plurality opinion states that under *Lockett* "the sentencer in capital cases must be permitted to consider any relevant mitigating factor," *id.* at 875, and that "the evidence Eddings offered is relevant mitigating evidence." *Id.* at 877. The rule of *Lockett* was violated because the trial judge "found that *as a matter of law* he was unable even to consider the evidence" and the state appellate court "took the same approach," *id.* at 876, so that "it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf." *Id.* at 877.

Justice O'Connor did not join Justice Powell's opinion, but specially concurred, stating that "the reasoning of the plurality opinion in *Lockett* compels a remand so

that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' " *Eddings*, at 879 (quoting *Lockett*). A remand was necessary for this reason because "it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence." *Id.* Then Chief Justice Burger, joined by Justices White, Blackmun and then Justice Rehnquist, dissented.

In the case *sub judice*, not only was no evidence tendered by the defense excluded, but the trial court's instructions expressly authorized consideration of all evidence admitted in answering the special issues, and, unlike *Eddings*, there is nothing to affirmatively indicate that the jury believed they could not consider any of the evidence for that purpose.

The Court applied *Eddings* in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), to reverse a death sentence because at the sentencing hearing the trial judge had excluded as irrelevant the defense's proffered "testimony of two jailers and one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail," and the prosecutor had nevertheless argued to the jury "that petitioner would pose disciplinary problems if sentenced to prison and would likely rape other prisoners." *Id.* 106 S.Ct. at 1670. Justice White's opinion for the Court states that under *Eddings* the capital "sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' " *Skipper* at 1671 (quoting *Eddings*). Justice White went on to hold:

> "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.' *Jurek v. Texas*, 428 U.S. 262, 275, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976). . . . [E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration." *Id.* (footnote omitted).[16]

Justice Powell, with then Chief Justice Burger and then Justice Rehnquist joined, concurred in the result, conceding that reversal was required on due process grounds because the death sentence had been sought on a factual basis the defendant had not been allowed to rebut, but rejecting the notion that *Eddings* and *Lockett* applied. *Id.* at 1673-1675. Justice Powell – author of the *Eddings* plurality – concluded that the States retained authority to "determine what particular evidence within the broad categories described in *Lockett* and *Eddings* is relevant in the first instance," that these determinations should be respected provided "they do not foreclose consideration

[16] The opinion concludes that because the excluded evidence was the only evidence from disinterested witnesses tending to contradict the prosecutor's argument, "it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence." *Id.* at 1673.

of factors that may tend to reduce the defendant's culpability for his crime," *id.* at 1674, and that "States are only bound to consider those factors that are central to the fundamental justice of execution." *Id.* at 1675. Nothing in Justice White's opinion appears inconsistent with these general premises.[17]

In *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), Justice Scalia, for a unanimous Court, reversed a Florida death sentence where the record "could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." *Id.* 107 S.Ct. at 1824. The defendant had requested that there be taken into account "the testimony concerning petitioner's family background and his capacity for rehabilitation," matters which were not included in the statutory mitigating circumstances. *Id.* at 1824.[18]

[17] Indeed, Justice White's opinion indicates evidence such as that of good personal hygiene practices while in prison might properly be treated as irrelevant. *Id.* at 1672 n. 2.

[18] The Florida statutory mitigating circumstances as set out in the opinion, *id.* at 1823 n. 3, did not include potential for rehabilitation or lack of future dangerousness or any analogous consideration (nor any general or residual mitigation category). Nor did they include matters such as troubled family history or turbulent upbringing (here, evidence that as a child the twenty-year-old defendant had the habit of inhaling gasoline fumes, as an apparent result of which his mind tended to wander, and that he was one of seven children of a poor family whose father died of cancer), although they did include whether the crime was committed while "under the influence of extreme mental or emotional disturbance" and whether

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The Court held that "the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid," citing *Skipper* and *Eddings*. *Id.*[19]

The next year the Court revisited the Texas statute in *Franklin*, where it found no constitutional error in the refusal of a requested jury instruction that any of the special issues could be answered negatively "if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty." *Id.* 108 S.Ct. at 2325 & n. 4. The only mitigating evidence was that defendant's prison service for several years both before and after the offense was without any disciplinary incident. *Id.* at 2324. Justice White's plurality opinion, joined by the Chief Justice and Justices Scalia and Kennedy, observed that "the Texas courts have expressed resolute adherence to *Lockett*" in the decade since it was decided, *id.* at 2326, and rejected the contention, based on the " 'independent' mitigating weight" language of *Lockett*, that defendant's "prison disciplinary record reflected so positively on his 'character' that the instructions . . . should have provided the jury with a 'mechanism through which to impose a life sentence' even if the jury otherwise believed that both Special Issues should

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defendant's capacity to appreciate the criminality of his conduct or to conform it to the requirements of law was "substantially impaired." The opinion contains no discussion whatever of the possible relevance of these latter factors to the "family background" claims of petitioner.

[19] The opinion observes that no harmless error argument was made.

have been answered 'yes.' " *Id.* at 2329. Justice White also expressly rejected the claim that the Constitution required that the jury, even if it answered the special issues affirmatively, be "still entitled to cast an 'independent' vote against the death penalty," stating that "this submission is foreclosed by *Jurek*, which held that Texas could constitutionally impose the death penalty if a jury returned 'yes' answers to the two Special Issues" and that "*Jurek* has not been overruled; and we are not inclined to take any such action now." *Id.* at 2330. The plurality opinion asserts that "*Lockett* does not hold that the state has no role in structuring or giving shape to the jury's consideration of . . . mitigating factors," *id.*, and that "we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused." *Id.* at 2331. Recognizing that "two lines of cases" – *Eddings* and *Lockett* on the one hand and *Gregg* and *Proffitt* on the other –"are somewhat in 'tension' with each other," Justice White notes that nevertheless "the Texas capital sentencing system has been upheld by this Court . . . precisely because of the way in which the Texas scheme accommodates *both* of these concerns." *Id.* He continues by stating:

> "Doubtlessly this is why this Court originally approved Texas' use of Special Issues to guide jury discretion in the sentencing phase, notwithstanding the fact – expressly averted to in the plurality opinion for the Court – that mitigating evidence is employed in the Texas scheme *only* to inform the jury's consideration of the answers to the Special Issue questions." *Id.* (emphasis added).

Justice Stevens, joined by Justices Brennan and Marshall, dissented, concluding the defendant's evidence of freedom from disciplinary violations during several years of imprisonment was relevant as mitigation in respects other than simply as it bore on his future dangerousness. Such evidence indicated "that petitioner's character was not without some redeeming features" and that he "may have virtues that can fairly be balanced against society's interest in killing him in retribution for his violent crimes," *id.* at 2335, and, by suggesting that his commission of the offense was "not in keeping with his . . . usual qualities or fruits," bore on his "culpability" for the offense as well as on his future dangerousness. *Id.* at 2336. Justice Stevens concluded that absent some special instruction such as the defendant had requested "it is probable that the jury misapprehended the significance it could attach to mitigating evidence that was descriptive of petitioner's character rather than predictive of his future behavior." *Id.* at 2337. This in Justice Stevens' view rendered the sentence invalid under *Lockett* and *Eddings* and related cases.

Justice O'Connor, with whom Justice Blackmun joined, specially concurred. *Id.* at 2332-2335. She considered *Lockett*, *Eddings* and *Hitchcock* as standing for the proposition that "punishment should be directly related to the personal culpability of" the defendant, and she concluded that "a state may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty." *Id.* at 2333. In Justice O'Connor's view, the evidence of defendant's good conduct in prison "had

no relevance to any other aspect of petitioner's character" than his future dangerousness. *Id.* Hence, no special instruction was required. Justice O'Connor contracted "[t]he limited probative value" of that particular mitigating evidence to "[e]vidence of voluntary service, kindness to others, or of religious devotion [which] might demonstrate positive character traits that might mitigate against the death penalty." *Id.* Her opinion also states:

> "If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or *that had relevance to the defendant's moral, culpability beyond the scope of the special verdict questions,* the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence. If this were such a case, then *we would have to decide whether* the jury's inability to give effect to that evidence amounted to an Eighth Amendment violation." *Id.* (emphasis added).

However, Justice O'Connor did not expressly proffer an answer to that question.

Penry

At long last, we turn to the crucial decision in *Penry*. There the evidence showed that the defendant, 22 years old and on parole from a prior rape conviction at the time of the charged offense, "suffered from organic brain damage and moderate retardation, which resulted in poor impulse control and in inability to learn from experience." *Id.* 109 S.Ct. at 2941. The brain damage was likely

present from birth, "but may have been caused by beatings and multiple injuries to the brain at an early age." *Id.* Penry's mother had "frequently beaten him over the head with a belt when he was a child," and he was "routinely locked in his room without access to a toilet for long periods of time." He "was unable to learn in school and never finished the first grade." Until age twelve, Penry "was in and out of a number of state schools and hospitals." *Id.* Thereafter, it took him over a year to learn to print his name. *Id.* at 2942. The two psychiatrists testifying for the State both opined that Penry was sane, but they also acknowledged his "extremely limited mental ability, and that he seemed unable to learn from his mistakes," one indicating that Penry had "an inability to learn from experience and a tendency to be impulsive and to violate society's norms." *Id.* Defense counsel unsuccessfully objected to the sentencing charge on several grounds, including its failure to define "deliberately" as used in the first special issue, its failure to "authorize a discretionary grant of mercy based upon the existence of mitigating circumstances," and its failure to condition a death sentence on a determination "that any aggravating circumstances . . . outweigh any mitigating circumstances." *Id.* At sentencing, defense counsel argued, among other things,

> "that if a juror believed that Penry, because of the mitigating evidence of his mental retardation and abused background, did not deserve to be put to death, the juror should vote 'no' on one of the special issues even if it believed the State had proved that the answer should be 'yes.' " *Id.* at 2950.

In response, the prosecutor noted that the defense counsel had not argued the special issues or shown how the state had failed to meet its burden of proof on them.

The court, in an opinion by Justice O'Connor, joined in this respect by Justices Brennan, Marshall, Blackmun and Stevens, set aside the death sentence, concluding:

> "In light of the prosecutor's argument, and in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.*[20]

Justice O'Connor first determined that the rule Penry sought to establish – that where evidence of the defendant's "mental retardation and abused childhood . . . is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence" – was not a " 'new rule' " for purposes of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), "because it is dictated by *Eddings* and *Lockett*."

Penry at 2947. The opinion goes on to explain that "*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. the sentencer must also be able to consider and give effect that that evidence in imposing sentence." *Id.* at 2947. Quoting her concurring opinion in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934

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[20] Justice Scalia, joined by the Chief Justice and Justices White and Kennedy, dissented from this holding. *Id.* at 2963-68.

(1987), Justice O'Connor states that "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse" and that a capital sentence " 'should reflect a reasoned moral response to the defendant's background, character, and crime.' " *Penry* at 2947. Penry's contention is again described as being that the Texas statute was applied in a manner "precluding the jury from acting upon the particular mitigating evidence he introduced." *Id.* Yet again, his claim is characterized as follows:

> "Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate punishment. We agree. Thus, we reject the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on mitigating evidence." *Id.*

The opinion goes on to explain this conclusion. Respecting the first special issue, the opinion, though suggesting some doubt about the matter, assumes, *arguendo*, that " 'deliberately' " was understood by the jury in this connection to mean "something more than" simply " 'intentionally' " (which had already been established by the guilty verdict.) *Id.* at 2948. It concedes that "Penry's mental retardation was relevant . . . to whether he was capable of acting 'deliberately.' " *Id.* at 2949. Nevertheless, "[p]ersonal culpability is not solely a function

of a defendant's capacity to act 'deliberately.' " A "rational juror" could have concluded "in light of Penry's confession" that he "deliberately killed . . . to escape detection."[21] However, "that same juror could also have concluded that Penry" – because his "mental retardation" made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," and "because of his history of childhood abuse" – "was less morally 'culpable than defendants who have no such

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[21] The opinion does not detail the content of the confession. However, it is described in the opinion of the Court of Criminal Appeals on direct appeal, *Penry v. State*, 691 S.W.2d 636 (Tex.Crim.App.1985), *cert. denied*, 474 U.S. 1073, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986), as reflecting that Penry "had been planning for months to rape somebody and that in the three weeks prior to the instant offense appellant had focused on the deceased and [another] as possible victims," *id.* at 653, that on the morning of the offense when he decided to go to the victim's house (where he forced his way in) and rape her "I knew that if I went over to the chick's house and raped her that I would have to kill her because she would tell who I was to the police and I didn't want to go back to the pen," *id.* at 641, 652-53, and that while the victim was lying helpless on the floor following the rape "I came back and sat on her stomach. I told her that I was going to kill her and that I hated to but I thought she would squeal on me." *Id.* at 641.

The opinion of Justice Clinton, concurring in the result on the direct appeal, espouses the view that the failure to define "deliberately" was error (the majority held it was not error), but that the error was harmless "due to the fact that the evidence of 'deliberateness' was uncontested, overwhelming and in large part gleaned from appellant's written admissions." *Id.* at 657.

excuse,' but who acted 'deliberately' as that term is commonly understood." *Id.* Thus, in the absence of a sufficiently broad definition of deliberately "we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue." *Id.*[22]

As to the second special issue dealing with future dangerousness, Justice O'Connor observes that Penry's mitigation evidence "is relevant *only* as an *aggravating* factor because it suggests a 'yes' answer to the question of future dangerousness." *Id.* at 2949 (initial emphasis added). She continues by stating that the evidence of Penry's "mental retardation and history of abuse," through diminishing his blameworthiness, "indicates that there is a probability that he will be dangerous in the future," and then quotes with approval from Judge Reavley's opinion for this court in that case, including the following:

> " 'If anything, the evidence made it more likely, not less likely, that the jury would answer the

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[22] Judge Reavley, writing for the court in our consideration of *Penry*, observed concerning the deliberateness issue:

> "Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that [the first] issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a *major thrust* of the evidence of his background and child abuse, logically, does not." *Penry v. Lynaugh*, 832 F.2d 915, 925 (5th Cir.1987) (emphasis added), *rev'd*, *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

> second question yes. It did not allow the jury to consider a *major thrust* of Penry's evidence as *mitigating* evidence.' 832 F.2d at 925 (footnote omitted) (emphasis in original)." *Id.* at 2950 (initial emphasis added).

Justice O'Connor then turns briefly to the third special issue, concerning whether the killing "was unreasonable in response to the provocation, if any, by the deceased." Although the opinion recites the evidence supporting the affirmative answer to this issue,[23] it does not expressly say or even suggest that the mitigating evidence had any relevance to the question (nor does it recite that the State asserted any such relevance). *Id.* at 2950.

Justice O'Connor concludes that resentencing is required because "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to" the evidence of Penry's "mental retardation and abused background" in "rendering its sentencing decision." *Id.* at 2952.

Penry clearly stands for the proposition that merely because the mitigating evidence has *any* relevance to a negative answer to one of the special issues does not necessarily suffice in all cases to sustain application of the Texas statute. Penry's evidence had *some* such relevance to the first issue. The more difficult question is whether

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[23] "Penry's own confession indicated that he . . . killed her after her struggle had ended and she was lying helpless." *Id.* at 2950. *See also* n. 21 *supra* (indicating that killing was to avoid detection and was contemplated for this purpose from the beginning).

the Texas statute can operate as written in any case where the mitigating evidence, though all clearly relevant to support a negative answer to one or more of the issues, nevertheless also has *any* mitigating relevance *whatever beyond* the scope of the special issues. *Penry* can fairly be read as precluding use of the Texas statutory scheme in any such situation. But, *Penry* can *also* fairly be read as addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of any of the issues. That, indeed, was the case in *Penry*, where as to the third issue the mitigating evidence was all essentially irrelevant, as to the second issue it was *only* affirmatively harmful to the defense, and as to the first issue its favorable relevance was essentially minor but its "major thrust" was beyond the scope of the issue (see notes 21 and 22 *supra*).

We conclude that *Penry* does not invalidate the Texas statutory scheme, and that *Jurek* continues to apply, in instances where no major mitigating thrust of the evidence is substantially beyond the scope of all the special issues. That is particularly appropriate in a case such as this, where there is no "major thrust" of any of the mitigating evidence which is not relevant to support a negative answer to the second special issue, the only special issue which *Jurek* addressed. Any other holding, it seems to us, would effectively render *Jurek*, and the Texas statutory scheme which it sustained, dead letters.

It is commonly accepted truism that, just as *none* of us is *all* good, so also *none* of us – not even those who will probably commit criminal acts of violence constituting a continuing threat to society – is *all* bad. The number of

capital crime defendants who have *nothing* in their background which might tend to reflect a positive character trait – who have *never* performed *any* voluntary service or exhibited *any* kindness to others or supported their family, to mention but three possible examples – must be minuscule at most. And this, of course, has been obvious all along. So too has it always been obvious that many defendants – because of some transitory condition such as relative youth or emotional distress incident to one of life's many crises to which all are subject such as divorce or loss of a loved one or a job – may, when they committed an offense, have been less able than those not so afflicted to control themselves and evaluate their conduct and its consequences. If *Penry* is read broadly, then in none of these cases can the Texas statutory scheme pass muster. Every one of these cases – the case where a month previously the defendant broke up with his girl friend or lost his job, the case where as a youth the defendant volunteered to mow a neighbor's yard or was in her early twenties when the offense was committed, and all the others – would demand some other system of sentencing trial. The Texas statutory scheme would be essentially meaningless and *Jurek* would have in substance been overruled.

We doubt that the Supreme Court intended this. Not only has the Court not expressly overruled *Jurek*, but to the contrary it has cited *Jurek* with approval numerous times. As an early example, in *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Court noted that *Jurek* upheld the Texas statutory scheme which "mandates a sentence of death" if the three "statutory penalty questions" are answered affirmatively, *id.* 100 S.Ct. at 2524 n.

1, and observed that Texas could properly ensure that its capital case jurors "be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias," while nevertheless recognizing that "jurors under the Texas . . . procedure unavoidably exercise a range of judgment and discretion while remaining true to their oaths." *Id.* at 2527. *See also Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980). As we have previously noted, *Lockett* states that the deficiencies of the Ohio statute "can best be understood" by comparing it to, *inter alia*, the "significantly different" Texas statute which *Jurek* upheld. *Lockett*, 96 S.Ct. at 2965, 2966. While the *Eddings* plurality does not cite *Jurek*, many decisions of the Court since then have. We have noted the prominence given to *Jurek* in *Skipper*, 106 S.Ct. at 1671. Other post-*Eddings* decisions citing *Jurek* with approval include *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 554-55, 98 L.Ed.2d 568 (1988); *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 2721, 97 L.Ed.2d 56 (1987); *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137 (1986); *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 876, 879, 79 L.Ed.2d 29 (1984) (declining to "effectively overrule *Jurek*"); *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 3453-54, 77 L.Ed.2d 1171 (1983); *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983); and *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 2742 n. 13, 77 L.Ed.2d 235 (1983). The *Franklin* plurality relied principally on *Jurek* and observed that the Texas "method for providing for the consideration of mitigating evidence has been cited repeatedly with favor." *Id.* 108

S.Ct. at 2331 (footnote omitted). Neither the *Franklin* concurrence nor *Penry* purports to jettison *Jurek*. Although *Penry* clearly makes an exception to *Jurek*, it gives no express indication that the exception made is conceived or recognized as being vastly broader than the rule itself, or that *Jurek* and the Texas scheme will thereafter remain valid only in the very rarest of cases.

Since *Penry*, the Court has continued to cite *Jurek* with approval. Thus, the Chief Justice's opinion in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 1081-82, 108 L.Ed.2d 255 (1990), joined in by Justices White, O'Connor, Scalia and Kennedy, describes *Jurek* and the Texas system in a way which obviously would be wholly inappropriate if either were viewed as still valid in no more than a small minority of cases. The same can be said for the opinion of Justice Kennedy, joined in by the Chief Justice and Justices White, O'Connor and Scalia, in *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 1261-62, 108 L.Ed.2d 415 (1990), the here pertinent language of which is quoted in the margin.[24] Plainly, Justice Kennedy

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[24] Justice Kennedy's opinion states:

> "to the extent that Penry's claim was that the Texas system prevented the jury from giving *any* mitigating effect to the evidence of his mental retardation and abuse in childhood, the decision that the claim did not require the creation of a new rule is not surprising. *Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in making the sentencing decision; Penry's contention was that Texas barred the jury from so acting. . . .

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regards *Penry* as the exception to *Jurek*, not *Jurek* the exception to *Penry*.

Moreover, as Justice Kennedy points out is *Saffle* (see not 24, *supra*), a broad reading of *Penry* is inconsistent with *Penry's* holding that its result was "dictated by" *Lockett* and *Eddings* for purposes of *Teague*.

Similar considerations require rejection of any notion that a broad reading of *Penry* is consistent with *stare*

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> "Penry's claim, moreover, did not ask us to apply the reasoning of *Lockett* and *Eddings* so much as it required us to apply our decision in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). *Penry* interpreted *Jurek* as holding that the Texas death penalty statute is constitutional so long as it is interpreted by the Texas courts to permit the jury to consider mitigating circumstances proffered by the defendant. . . . Having thus construed *Jurek*, we concluded that resolution of Penry's claim that 'those assurances were not fulfilled *in his particular case*,' 492 U.S. at [318], 109 S.Ct. at 2947 (emphasis in original), did not involve the creation of a new rule. . . . *Penry*, . . . must be understood in terms of the Court's ruling in *Jurek*, and its application in later cases. We did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek*; rather, we indicated that *Lockett* and *Eddings* reaffirmed the reasoning in *Jurek*. . . . ". *Id.* 110 S.Ct. at 1261-62 (initial emphasis added).

Justice Kennedy goes on to cite *Jurek* as an example of "our long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Id.* 110 S.Ct. at 1262.

decisis because the Texas courts have not kept the "assurance" of *Jurek*, or the Texas scheme is really different than it appears on its face or had been described by the Texas courts prior to the Supreme Court's decision in *Jurek*. The opinion in *Jurek* – rendered the same day as *Woodson* required "particularized consideration of relevant aspects of the character and record of each convicted defendant" – explicitly recognizes that the Texas jury is only allowed to answer "yes" or "no" to three statutory questions and that if these are answered "yes" the death penalty is automatic. The exact working of the questions is reflected in the Court's opinion. The Court holds that the issue is whether these specific "enumerated questions allow consideration of particularized mitigating factors." *Id.* at 2956. The Court gives an affirmative answer *not* on the basis of any assumed special instructions or definitions being given to the jury, but rather *entirely* on what *evidence* the Texas courts have said may be brought before and considered by the jury *in answering* the second (future dangerousness) question. Thus, the Court relies on the Texas court opinion which it describes as interpreting "the second question to allow *a defendant to bring to the jury's* attention whatever mitigating circumstances he may be able to show." *Id.* (Emphasis added). The Court next quotes the Texas court's language in which it says "the jury could consider" various items of evidence – including matters such as presence or absence of past criminal conduct, "age of the defendant" and "mental or emotional pressure" – "[i]*n determining the likelihood that the defendant would be a continuing threat to society.*" *Id.* (emphasis added). The Supreme Court then says "[b]y authorizing *the defense to bring before the jury* . . . whatever

mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.* at 2958 (emphasis added). This "assurance" has not been broken or even slightly bent, but on the contrary has been fully performed. Texas has continued to interpret its sentencing statute just exactly as the Supreme Court in *Jurek* assumed it would.

The Supreme Court's opinion in *Jurek* reflects that the defendant there was twenty-two years, old, had been drinking beer earlier in the day of the offense, and had been steadily employed and contributed to his family's support. *Id.* at 2954. At the very least, *Jurek* must stand for the proposition that these mitigating factors – relative youth and evidence reflecting good character traits such as steady employment and helping others – are adequately covered by the second special issue. *Penry* cannot hold otherwise and at the same time not be a "new rule" for *Teague* purposes. The decisions in *Eddings* and *Lockett* do not justify a contrary conclusion, as *Saffle* says "[w]e did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek*; rather" these cases "reaffirmed the reasoning in *Jurek*." *Saffle* at 1262.

We believe that what *Penry* represents is a set of atypical circumstances of a kind that, quite understandably, neither the Texas Court of Criminal Appeals nor the Supreme Court in *Jurek* had in mind, namely circumstances where the defense's mitigating evidence would have either no substantial relevance or only adverse relevance to the second special issue. Typically, evidence of good character, or of transitory conditions such as youth

or being under some particular emotional burden at the time, will tend to indicate that the crime in question is not truly representative of what the defendant's normal behavior is or may become over time, and that the defendant may be rehabilitable so as not to be a continuing threat to society. The core of *Jurek* – which we cannot conclude has been abandoned – is that the mitigating force of this kind of evidence is adequately accounted for by the second special issue. But in *Penry* the Court was faced for the first time with a wholly different type of mitigating evidence. Not evidence of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition, but of a permanent one; but *nonetheless* evidence which was strongly mitigating because these characteristics were due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue. To recognize that, as *Penry* did, is not necessarily to deny the validity of *Jurek* as it applies to the more typical case.

We conclude that the core of *Jurek* remains intact, and we now apply it to the circumstances *sub judice*.

Youth

The primary mitigating factor which Graham urges was not adequately encompassed in the special issues is his youth. We disagree.

For at least five years before Graham's trial, it was established Texas law that the jury, in answering the second special issue, could consider "the age of the defendant." *Jurek v. State*, 522 S.W.2d 934, 940 (Tex. Crim.App.1975), *aff'd sub nom. Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Since then, the Texas decisions have consistently followed this rule. For example, in *Roney v. State*, 632 S.W.2d 598 (Tex.Crim.App.1982), the Court of Criminal Appeals, noting that the defendant was seventeen and that "the age of the defendant" was "relevant in deciding the second punishment issue," *id.* at 601, held that considering the entire record, including the defendant's "young age," the evidence was insufficient to support the jury's affirmative answer to the second issue. *Id.* at 603. *See also, e.g., Robinson v. State*, 548 S.W.2d 63, 64 (Tex.Crim.App.1977); *Earvin v. State*, 582 S.W.2d 794, 798-99 (Tex.Crim.App. 1979); *Brasfield v. State*, 600 S.W.2d 288, 293 n. 3 (Tex.Crim.App.1980); *Keeton v. State*, 724 S.W.2d 58, 61 (Tex.Crim.App.1987).

The Supreme Court's opinion in *Jurek* affirmatively reflects that the defendant was "22 years old at the time" of the offense, *id.* at 2954, and, in upholding the death sentence and the Texas scheme, quotes, the portion of the Court of Criminal Appeals' opinion stating that in answering the second issue the jury can consider " 'the age of the defendant.' " *Id.* at 2957. *Jurek* thus squarely answers the question of whether "youth" is adequately taken into account by the second special issue. If *Penry* compels a different result, it would have been a new rule for purposes of *Teague*, as *Saffle* makes clear. Indeed, if *Jurek* may not apply to the very type of case that was then before the Court, it has been overruled. But, as noted, the

Supreme Court has not so treated it. Moreover, *Penry* itself involved a twenty-two-year-old defendant, *id.* at 2941, and the opinion contains no suggestion whatever that this fact was one which could not be adequately taken into account in answering the statutory special issues.[25]

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[25] Nor can we accept the notion that twenty two is not youthful for purposes of any constitutionally mandated rule that the capital sentencer must be able to take into account the defendant's "youth" at the time of the offense. Texas clearly regards those in their early twenties as youthful for this purpose. *See, e.g., Lackey v. State*, ___ S.W.2d ___ ___ (Tex.Crim. App.1991) (describing as a mitigating circumstance "youthful age (23) at the time of the offense"); *Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991) ("There is also mitigating evidence of appellant's youth; appellant was twenty-one years old at the time of the offense"); *Madden v. State*, 799 S.W.2d 683, 684 (Tex.Crim.App.1990) ("Appellant, however, introduced substantial mitigating evidence. He was only twenty-one years old at the time of this offense"). The salient factors which make "youth" mitigating – principally inexperience with resultant diminished judgment and selfcontrol – are all generally present among those in their early twenties, albeit to a lesser degree than in those still younger. And this, indeed, is the approach taken by Graham's counsel, as reflected in his statements in closing argument (see note 28 *infra; see also* text at note 9 call *supra*). We do not believe that for this purpose a categorical distinction is proper based on some specific age, such as eighteen, which is often the age of majority (in Texas minors are those under eighteen who have never been married; Tex. Probate Code § 3(t)) or the minimum age for purposes of engaging in certain conduct (cf. U.S. Const.Am. XXVI). The Supreme Court rejected such an approach in holding that the Constitution does not forbid the death sentence for offenses committed at age sixteen or seventeen. *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Moreover, such an

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Since *Penry*, the Texas Court of Criminal Appeals has continued to hold that the second special issue provides an adequate vehicle for the jury to take into account the defendant's youth. *See Ex parte McGee*, 817 S.W.2d 77, 80 (Tex.Crim.App.1991); *Lackey v. State*, ___ S.W.2d ___ (Tex. Crim.App.1991); *Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991). We, too, appear to have recognized this. *See DeLuna v. Lynaugh*, 890 F.2d 720, 722 (5th Cir.1989) (evidence that defendant was twenty-one when offense committed would not bring him within *Penry*).

As the panel majority and dissent each correctly recognized, youth is mitigating because insufficient experience has not allowed judgment and self-control to fully develop, but the limitations attributable to youth are all necessarily transitory. *Graham*, at 898, 899. Therefore, whatever is mitigating about youth tends to lend support to a "no" answer to the second special issue, and its tendency to do so is essentially proportional to the degree to which the jury concludes such factors were influential in the defendant's criminal conduct. The greater the role such attributes of youth are found to have played in the defendant's criminal conduct, the stronger the inference that, as his youth passes, he will no longer be a danger to

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approach would be at war with the concept of individualized capital sentencing which underlies *Penry*. It is common knowledge that individuals develop and mature at different rates, and it will frequently be the case, for example, that one eighteen and, say, two months, is actually less "mature" and more "youthful" than another who is seventeen and eight months.

society. Thus, the second special issue affords an adequate vehicle by which the jury can give effect to the mitigating aspect of youth.

We reject the contention that the second special issue is inadequate for this purpose because the jury may believe that youth mitigated the defendant's culpability though not his future dangerousness. But youth is not mitigating with respect to conduct not attributable to it. Thus, *Penry* says that evidence of a defendant's background and character is relevant because " 'defendants who commit criminal acts that are *attributable to* a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Id.* at 2947 (quoting Justice O'Connor's concurrence in *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)) (emphasis added). *See also Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 1199, 108 L.Ed.2d 316 (1990) (same).[26] To the extent that Graham's criminal conduct was a product of his youth he was for that reason not only less culpable but, to the same extent, also less likely to be dangerous when no longer young. To

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[26] It is true that a hypothetical juror might conclude that death is always an inappropriate penalty for capital murder committed by a seventeen year old simply because the offender was seventeen, and regardless of whether the offense was to any extent attributable to his youth. However, such a conclusion is not based on individualized consideration of the offender but merely on a characteristic which is *precisely* the same for him as for every other human being who attains that age, and as such amounts to no more than disagreement with the Texas law which allows execution of seventeen year olds for capital murder.

the extent Graham's criminal conduct was not attributable to his youth, his youth neither reduced his culpability nor his future dangerousness. Nothing in the present record suggests that the jury here might have viewed the matter in any other light.[27]

Finally, the evidence here, and the manner in which the case was approached and tried in this respect, do not suggest any special factor or circumstance militating against application of what we conceive to be the appropriate general rule, namely that the mitigating force of the defendant's youth at the time of the offense may be adequately taken into account in answering the second special issue. In marked contrast to *Penry*, there is here nothing to suggest that defense counsel desired to have the mitigating force of youth presented or considered in any other manner than as a basis for a negative answer to the second special issue.[28] *Cf. Lowenfield*, 108 S.Ct. at 552

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[27] Moreover, to say that the second special issue is for this reason inadequate to take youth into account, is necessarily to also say that it is inadequate to take into account any other mitigating factor which is not wholly coterminous and synonymous with future dangerousness. Yet, as previously indicated, that would be contrary to the core holding of *Jurek*, and would in effect render *Jurek* and the Texas statute it upheld a dead letter. We do not read *Penry* as going that far.

[28] Counsel in essence argued that Graham's youth explained his May 13 to 20 crime spree and that he would grow out of it: "A young man, hasn't even reached 20 years old. He goes on a rage for 7 days, 7 days out of his life. He is not going to ever forget. . . . Gary Graham, 17 years old, went on a rage for 7 days," and:

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(even where absence of objection is not a waiver it may reflect posture and understanding of trial participants).

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> " . . . what you are called upon to do is predict whether some time in the future Gary Graham could become a person fit to return to society. At least he is alive. See, when you are 17 or 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. When people come in their middle 20's and middle 30's, a change a little bit from your more radical stands to a more somewhat upright posture because you have had not only time to think, but to see what is in the world. Most of the crime is committed by young people. By the time you get to 25 or 35, it's different. 35 and above. . . . because there is something about human nature that not only changes you, but slows you down as you live. If you live. If you live. . . . "

The only dissatisfaction counsel expressed with the charge or special issues was by pretrial motion asserting that the special issues left too much standardless discretion to the jury. See note 11, *supra*.

Nothing in the evidence indicates any basis for believing that the offense charged was any more (or less) a product of Graham's youth than any of his other criminal conduct shown by the evidence, and neither side ever suggested otherwise either at trial or in this court.

We reject Graham's contention in this court that his case is like *Penry* because here the prosecutor's argument (especially in respect to "direction" and "seeds of our past") amounted to an implied assertion that Graham's *youth* itself favored an affirmative answer to the second special issue. We disagree. The clearly most reasonable understanding of this unobjected to argument is that it is no more than the mere assertion that

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We reject Graham's contention that, in light of *Penry*, the mitigating force of his youth could not adequately be given effect in answering the special issues.

Other circumstances

Although the mitigating factor primarily at issue is youth, Graham also contends that under *Penry* the testimony of his stepfather, Samby, and his grandmother, Chron, constituted mitigating evidence which could not adequately be given effect in answering the special issues. We disagree.

With one exception to be noted, the testimony of Samby and Chron simply constituted rather mild evidence of normal, good – though not exceptionally good –

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Graham's criminal conduct was the most reliable predictor of the direction his future would take. There is absolutely nothing in the argument which implies that this is any *more* likely so because the events of May 13-20, 1981 occurred while Graham was seventeen as opposed to, say, thirty-five (nor even that this was *as* likely so as it would have been if Graham had been thirty-five in May 1981). The prosecutor was not required to concede that just because of Graham's youth he would not in the future be a danger to society. And, there is nothing inconsistent in the assertions that, on the one hand, some youthful criminals may pose a danger to society even after they mature, and, on the other hand, that criminal acts by youths are *less* likely to be predictive of future such behavior on their part as a mature adult than are similar acts by those who are already mature adults. Moreover, we are aware of nothing to suggest that Texas has ever treated youth in this connection as anything other than a factor tending to favor (albeit not necessarily to require) a "no" answer to the second special issue.

character on Graham's part: he had respect for and was nice to his mother and stepfather, cared about and was close to his mother, gave his grandmother no problems or trouble, was never violent, never had weapons, would willingly help out around the house, went to school and to church, "loved the Lord," worked and contributed to the support of his two children.

It appears to us that the principal mitigating thrust of all this evidence is to suggest that the events of May 13-20 were aberrational and atypical of Graham's true character and that he thus had potential for rehabilitation, and would not be a continuing threat to society. As such, the mitigating force of this evidence can adequately be given effect under the second special issue.

This evidence does not seem different in kind from that before the Supreme Court in *Jurek*, where the defendant's father testified that "the petitioner had always been steadily employed since he had left school and that he contributed to his family's support." *Id.* at 2954. Nor does this sort of character evidence seem other than wholly typical of what might be expected in a vast number of cases. As noted, were evidence of this kind held to invoke *Penry*, then *Jurek* and the Texas statutory scheme would for all practical purposes be wholly eviscerated.[29] Further, this sort of evidence is different in kind

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[29] We observe that since *Penry*, the Texas courts have held that this kind of evidence is not *Penry* evidence and does not mandate departure from the *Jurek* format. *See, e.g., Ex parte Baldree*, 810 S.W.2d 213, 216-17 (Tex.Crim.App.1991) (evidence that defendant "has been caring, kind, and nonviolent to

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from that involved in *Penry*, as its relevance to each of the special issues, and particularly the second, is entirely in the direction of a negative answer, and it has no tendency to reduce culpability for the particular crime charged in any way not encompassed within one or more of the special issues. Unlike *Penry* type disability evidence, which can reduce culpability where it is inferred that the crime is attributable to the disability while other similar offenders have no such "excuse," good character evidence provides no variety of "excuse." Further, absent some unusual indication of an essentially *permanent* adverse *change* in character (e.g., brain damage), to the extent that the testimony is convincing that the defendant's general character is indeed good it will also, to

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others . . . is . . . reflective of his character and bears upon his propensity, or lack thereof, for committing future violent acts" and thus is adequately covered by the second special issue without further jury instructions); *Richardson v. State*, 1991 WL 99949, ___ S.W.2d ___ (Tex.Crim.App. June 12, 1991, No. 68934) ("evidence of appellant's religious devotion is *Franklin* evidence and could be properly addressed by a jury answering issue number two"); *Mooney v. State*, 817 S.W.2d 693 (Tex.Crim.App.1991) (same). *See also Trevino v. State*, 815 S.W.2d 592, 622 (Tex.Crim.App.1991). In *Boyd v. State*, 811 S.W.2d 105, 111-112 (Tex.Crim.App.1991), the court considered evidence that appellant "was a good worker and was promoted," "was always polite, nice and helpful," "always behaved in a respectful manner," and helped his sister "with her asthma" and his mother "when she hurt her ankle." *Id.* at 111. In rejecting a *Penry* claim, the court said that this evidence "was given full effect within the second special issue" and "[t]o hold otherwise would be tantamount to declaring the capital sentencing scheme facially unconstitutional." *Id.* at 112 (footnote omitted).

essentially the same extent, be convincing that he will not continue to be a threat to society.

There remains only to consider the brief portion of the testimony of Chron that Graham's mother was frequently hospitalized, commencing when he was approximately three, with what Chron characterized without elaboration as a "nervous condition" or "mental illness." In an appropriate context, evidence of this general kind might well form part of a proper *Penry* presentation. We conclude that it does not do so in this case, however, There was no evidence of *any* effect this had on Graham, or of any reaction on his part to it, and no attempt was made to even explore that subject. Further, the entire context in which this testimony was presented, from the point of view both of Chron's testimony as a whole and of all the defense evidence at the sentencing hearing, suggests that there was no adverse effect on Graham. There was no suggestion that he was unhappy, withdrawn, moody, difficult to control or the like or that he had any mental or psychological problems. The entire thrust of the defense evidence, both from Samby and Chron, was the exact opposite, namely that Graham was a good, stable, nonviolent, ordinary youth. There is no substantial evidence that Graham's criminal conduct was "attributable to a disadvantaged background, or to emotional and mental problems," as Justice O'Connor used those terms in *Penry*. *Id.* at 2947. *See also Boyde*, 110 S.Ct. at 1199. In this respect, the evidence as a whole is simply not comparable to that in *Penry* or *Eddings*.

In sum, not only Graham's youth but also his other mitigating evidence could adequately be taken into

account in answering the special issues, particularly the second.[30]

Conclusion

As directed by the Supreme Court, we have further considered our previous affirmance of the district court's denial of habeas relief in light of *Penry*. We conclude that our prior disposition is consistent with *Penry*, and remain convinced that it was proper. Accordingly, we reinstate our prior mandate affirming the district court's dismissal of Graham's habeas petition.

AFFIRMED.

REAVLEY, Circuit Judge, with whom POLITZ, KING, DAVIS, and WIENER, Circuit Judges, join, dissenting:

The Supreme Court directed this court to reconsider Graham's petition in the light of *Penry*, not to modify *Penry* or to shape *Penry* for a comfortable fit with *Jurek*. In *Penry* Justice O'Connor wrote for the Court that the jury must be able to fully consider and give effect to all "evidence that mitigates against the death penalty" and is relevant to a defendant's background, character, or the

[30] We have focused throughout on the second special issue because it is with respect to it that Graham's evidence had the most apparent and strongest mitigating relevance, and because that is the issue addressed in *Jurek*. We do not imply, however, that Graham's evidence lacked mitigating relevance to the first (or even to the third) special issue; it does have such relevance, and that relevance strengthens our conclusion that the special issues were adequate in this case; but whether such relevance to issues other than the second would alone suffice to take this case out of *Penry's* scope is another matter.

circumstances of the crime. 109 S.Ct. at 2947, 2951. If youth is an important mitigating factor – and the Court has said that it is[1] – then *Penry* requires that the sentencing jury be allowed to decide that the death penalty is an inappropriate penalty for Gary Graham. That decision could not have been given effect in his case, and the writ should be granted.

The panel majority stated the *Penry* rule as follows: "a jury sentencing a capital defendant who provides evidence about his character, his background, or the circumstances of the offense that is relevant to personal culpability beyond the scope of the statutory questions must receive instructions that allow the jury to give effect to such evidence." 896 F.2d at 896. The en banc majority, after 21 months, produces an exclusion to the *Penry* rule and holds that no instruction or jury decision is needed for transitory circumstances of mitigation. This court says that any circumstance relevant to whether the defendant is rehabitable may be adequately treated by the answer to the second issue. Contrary to what the Supreme Court wrote, the Fifth Circuit explains *Penry* as an atypical case where the mitigating evidence either had no substantial relevance, or no adverse relevance, to the second special issue of future dangerousness. I believe my colleagues

[1] See panel opinion 896 F.2d at 897-98. In *Eddings v. Oklahoma* the Supreme Court said: "All this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must background and emotional development be duly considered in sentencing." 102 S.Ct. at 877.

have gone beyond and contrary to the directions of the Supreme Court and have usurped the role of our superiors.

Graham was 17 years old, legally a minor, when he committed the crime. It is beyond dispute that this fact was a mitigating circumstance, material to the "moral culpability" of the defendant. The jury's sentencing role is to consider such factors and determine whether the defendant is indeed personally and morally culpable. But "culpability" at the punishment phase is not simply a question of guilt or "blameworthiness," but rather a question of "deathworthiness." *See Lackey v. State*, ___ S.W.2d ___, ___ (Tex.Crim.App.1991) (en banc). To say that evidence mitigates a defendant's culpability is not to say that he is any less guilty or deserving of blame, but that he is less deserving of death. *See Penry*, 109 S.Ct. at 2950 (a juror could believe that "Penry lacked the moral culpability to be sentenced to death").

The special issues of the Texas statute demonstrate how evidence can be relevant to a defendant's culpability. The guilty defendant may be less deserving of death because the evidence shows that he did not act deliberately, or that he does not pose a continuing threat to society, or that his conduct was not unreasonable in response to provocation by the deceased. Indeed, much evidence is mitigating only because it is relevant to one or more of these issues. *See Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 2333, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring) (evidence of the defendant's good conduct in prison had no relevance to his character outside of the special issues). But the message of *Penry* is

that some evidence may make the defendant less deserving of death for reasons "beyond the scope of the special issues." *Penry*, 109 S.Ct. at 2948. The evidence of Penry's mental retardation and history of abuse may not have made his crime less deliberate or his continuing threat to society less probable, but it may nevertheless have made him less deserving of death because it may have made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Id.* at 2949. Presented with the special verdict questions, and "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 2950.

This case presents the same dilemma. The jury found that Graham's youth did not make his crime less deliberate or his future threat to society less probable. But a reasonable juror could also have determined, if given the opportunity, that Graham did not deserve a death sentence because, at the age of 17, he was less able to control his impulses or evaluate the consequences of his conduct, or because of other relevant reasons. The majority seems to overlook the fact that "there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant." *Id.* at 2951. In this case, as in *Penry*, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of [Graham's youth] by declining to impose the death penalty, . . . the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence

in rendering its sentencing decision." *Id.* at 2952. Under *Penry*, the jury should have been allowed to weigh that factor in deciding whether Graham deserved to be sentenced to death.

The majority of this en banc court insist upon crafting their own exclusion and following *Penry* only where there is a "major mitigating thrust of the evidence . . . substantially beyond the scope of all the special issues." They even declare that youth is mitigating only with respect to conduct attributable to age, and that the mitigating factor of youth at the time of the offense may be adequately taken into account by a Texas jury in answering the issue of future dangerousness. But the Supreme Court requires the sentencer, before assessing the death penalty, to consider all mitigating evidence, not only mitigating factors that contributed to particular criminal conduct. And the Court does not weigh the "thrust" of the mitigating evidence as between special issues and the decision to sentence to death.

Youth, like mental retardation or crippling circumstances in the defendant's background, may be related to deliberateness or to future dangerousness, but those facts of a defendant's life may also affect an entirely different "thrust" and decision. They may reach the much broader ultimate question: Is death the appropriate response to this human being, considering his moral culpability as a person? Graham's jury was not told that it could consider evidence in this light or that it could give mitigating effect to it in imposing sentence.

The majority opinion is heavy with scholarship and fine legal argument. It undoubtedly alleviates problems

in reviewing the cases of Texas prisoners on death row. I fully appreciate the problems. The Texas Court of Criminal Appeals is struggling with them too. *See Black v. State*, 816 S.W.2d 350 (Tex.Crim.App.1991); *Ex parte Harvey Earvin*, 816 S.W.2d 379 (Tex.Crim.App.1991); *Lackey v. State*, ___ S.W.2d ___ (Tex.Crim.App.1991). This does not justify the failure to follow the dictate of the Supreme Court. I would follow that dictate unless the Court, which alone has the authority, chooses to modify our instructions.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

The ultimate question in this case is whether the mitigating value of Graham's youth and family circumstances – age seventeen at the time of the offense – is fully expressed by the jury in its answer to two questions: did Graham act deliberately and does Graham present a future danger. The majority opinion, after first concluding that any deficiency in the two questions must be substantial, holds that the answer is yes. I am unpersuaded that the jury's assessment of Graham's moral culpability is fully, or substantially as the majority has it, exhausted by concluding that he acted deliberately and presents a future danger. A jury's reasoned response could be that although Graham acted deliberately, and is likely to do so again, when Graham's tender years and family circumstances are entered in the account of moral culpability, a death sentence is not warranted.

It was true before *Penry* that "[t]he state may not by statute preclude the sentencer from considering *any* . . .

relevant mitigating evidence."[1] That did not necessarily mean, however, that the state could not limit the effects of mitigation. There was a powerful argument that, given *Jurek*, the Eighth Amendment allowed the state to limit the effects a sentencer might give to mitigating evidence. Justice Scalia made the argument in *Penry*, but his was the dissenting view.

I intend no criticism of the majority's able struggle, but I am not persuaded that we have the freedom to define again the jury's sentencing role in Texas. I say "again" because two decisions of the Supreme Court control this case. The first is that the state, without fettering effect, must give the jury the means for expressing its reasoned moral response.[2] The second decides that Graham's youth and family circumstances are relevant to the core decision for the jury – his moral culpability.[3]

The state may insist upon the jury's "reasoned" moral decision, but the contribution of Graham's youth to his moral culpability, beyond the issues of deliberateness and future dangerousness, has no intrinsic measure or objective weight. There is a point at which we must accept that the moral culpability of a particular person for a particular crime is what the jury says that it is. With all deference, this quintessential blackbox decision yields

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[1] *Eddings v. Oklahoma*, 455 U.S. 104, 113-115, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982).

[2] *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

[3] *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 2978, 106 L.Ed.2d 306 (1989); *see also Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 2698, 101 L.Ed.2d 702 (1988).

to no logical or explainable divisor. It is not a "legal" question at all, but is rather like asking judges not to reason but to look to the sky, presumably, and react. Such discrete Rorschach-like inquiries do not produce normative rules. That we are asked to perform such tasks is a powerful signal that something is wrong. The wrong is not difficult to locate. As Justice Harlan put it in *McGautha*:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty and to express these characteristics in language which can fairly be understood and applied by the sentencing authority, *appear to be tasks, which are beyond present human ability* (emphasis supplied).[4]

Furman repudiated *McGautha*, but Justice Harlan's wisdom is validated with each encounter of dead ends in the resulting conceptual puzzle. And a puzzle it is.

For example, the Supreme Court in *Cabana v. Bullock*[5] upheld the death sentence while observing that "the jury may well have sentenced Bullock to death despite concluding that he had neither killed not intended to kill."[6]

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[4] *McGautha v. California*, 402 U.S. 183, 204, 91 S.Ct. 1454, 1466, 28 L.Ed.2d 711 (1971).

[5] 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

[6] 474 U.S. at 384, 106 S.Ct. at 696.

This despite the fact that in *Enmund v. Florida*[7] the court held that the Eighth Amendment forbids the death penalty for "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing takes place, or that lethal force will be employed".[8] I would have supposed that whether an accused intended to kill lies at the heart of moral culpability; that the finding of intent to kill would be left with the sentencer. Stated another way, if a state's procedures must allow a defendant's mitigating evidence to find expression in its verdict it is puzzling to allow a state appellate court to supply the critical finding of intent to kill, a finding missing from the jury's verdict. It is a long road from *McGautha* to *Penry*, but the resulting jurisprudence is perverse in that it insists on a reasoned moral response of the jury, an assignment we jurists have failed.

The solution must be left to the Supreme Court, at least in cases as this one where we are left no meaningful latitude. In any event, this case is already so postmarked by the predictable scattering of judges required to react, not reason.

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[7] 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

[8] 458 U.S. at 797, 102 S.Ct. at 3376.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-2168

D.C. Docket No. CR-H-88-563

GARY GRAHAM,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Dept. of Criminal Justice,
Institutional Div.,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

On remand from the Supreme Court of the United States

Before CLARK, Chief Judge, REAVLEY, POLITZ, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, and BARKSDALE, Circuit Judges.*

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* Judges Emilio M. Garza and Harold R. DeMoss, Jr. were sworn in after this case was argued to the En Banc Court and elected not to participate in this en banc decision.

JUDGMENT

This cause came on to be heard on rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause is affirmed by the Court in banc.

January 3, 1992

ISSUED AS MANDATE:

REAVLEY, Circuit Judge, with whom POLITZ, KING, DAVIS and WIENER, Circuit Judges, join dissenting.

HIGGINBOTHAM, Circuit Judge, dissenting.

SUPREME COURT OF THE UNITED STATES

No. 91-7580

Gary Graham,
Petitioner

v.

James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 8, 1992